Supreme Court, U.S.
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No. 03-1670

In The
Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza,
20th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

QUESTIONS PRESENTED

William Thurston was tried and convicted of the sole charged count of conspiracy to defraud the United States. The district court imposed a sentence of three months' imprisonment followed by home detention and supervised release, departing downward from the federal sentencing guideline range on two grounds: (1) Thurston's extraordinary charitable work and community service, and (2) the disparity between his guideline sentence of five years' imprisonment, and a more culpable co-conspirator's probationary sentence. The government appealed the sentence. After Thurston served his prison term, and appellate briefing was completed, but before the court of appeals issued its decision, Congress enacted the PROTECT Act, which changed certain applicable sentencing provisions.

The questions presented are:

1. Whether applying the PROTECT Act to a case pending on appeal on the date of enactment contravenes statutory construction, retroactivity, and *ex post facto* doctrines.

2. Whether *de novo* review to determine whether a departure is "justified by the facts of the case" (a) is limited to consideration of extra-record sources that the district court is entitled to consider, and (b) requires affording weight to the district court's experience, expertise, and unique vantage point in sentencing.

3. Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial.

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PETITION FOR A WRIT OF CERTIORARI

William Thurston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The court of appeals' February 4, 2004 opinion (Appendix, *infra*, ("App.") 1a-63a) is reported at 358 F.3d 51. The First Circuit's prior opinion (App. 66a-119a), dated August 4, 2003, and published in the advance sheet at 338 F.3d 50, was withdrawn (App. 65a), but is available at 2003 U.S. App. LEXIS 15516. The district court's judgment of conviction and sentence (App. 121a-128a) and the court's oral statements of reasons for imposing the sentence (App. 206a-207a, 212a-226a, 231a, 233a-234a) are unreported. The district court's October 2, 2003 memorandum and recusal order (App. 129a-132a) are reported at 286 F. Supp. 2d 70.

STATEMENT OF JURISDICTION

The court of appeals' initial judgment and opinion were entered on August 4, 2003. Thurston timely filed a petition for rehearing on August 28, 2003. On February 4, 2004, the court vacated the initial judgment, withdrew the initial opinion, entered a new judgment and opinion, and, accordingly, denied as moot the August petition. App. 65a. Following the modified decision, Thurston timely filed a petition for rehearing, which the court denied on March 18, 2004. App. 134a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 401 of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("the PROTECT Act" or "the Act"), Pub. L. No. 108-21, 117 Stat. 650, amended, *inter alia*, 18 U.S.C. § 3553(a), (b),

and (c); and 18 U.S.C. § 3742(e), (f), (g), and (j). These Code provisions are reprinted in the Appendix at 154a-164a in a black-lined format showing the changes made by the Act. All relevant provisions of the Act are reprinted in the Appendix at 135a-153a. This petition also involves the Due Process Clause of the United States Constitution, which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, and the *Ex Post Facto* Clause, which provides that "[n]o . . . ex post facto Law shall be passed." *id.* art. I, § 9, cl. 3.

STATEMENT OF THE CASE

In a one-count indictment returned on January 22, 1998, Thurston and three other former executives of Damon Clinical Laboratories, Inc. ("Damon") were charged with violating 18 U.S.C. § 371 by conspiring to defraud the United States between July 1987 and August 1993. Gov't App. in 1st Cir. ("G. App.") 34-67. The district court had jurisdiction under 18 U.S.C. § 3231.

Before Thurston went to trial, one of his co-defendants, Joseph Isola, who had been Damon's President, pleaded *nolo contendere*. As part of Isola's plea deal, he agreed to sign a statement of facts in connection with a one-count information charging violation of 18 U.S.C. § 371, and to waive preparation of a presentence report. The prosecutors, aware that the district court had indicated that a probation-only sentence might be appropriate, dismissed the indictment, filed the information, joined Isola's waiver of the presentence report, and agreed not to appeal the sentence. The prosecutors made no recommendation as to Isola's sentence under the federal sentencing guidelines ("the Guidelines"), and made no mention of "amount of loss" or any other fact as relevant to sentencing. The court sentenced Isola to three years' probation and imposed a $100 special assessment. Isola did not agree to cooperate with the government. Accordingly, his sentence was not the result of either a cooperation agreement or a downward

departure based on substantial assistance to authorities. App. 166a-175a.

The government offered Thurston a similar plea deal. App. 130a, 219a. Immediately after Isola was sentenced, with Thurston's counsel and the prosecutors present, the district court explained that if Thurston were to decline this offer he might not receive a two-level reduction for acceptance of responsibility. But the court also made clear that it "would [n]ever increase a person's sentence because he exercised his right to go to trial." App. 175a-176a.

Thurston exercised his right to trial. The jury returned a guilty verdict on December 17, 2001. The prosecutors, in contrast to their conduct as to Isola, provided the Probation Office with an adversarial "summary of the facts," which was then incorporated nearly verbatim into the presentence report. This included the assertion of an "intended loss" of $5,800,000, meriting a 14-level guideline enhancement. The prosecutors argued for a guideline sentence of 78 to 97 months' imprisonment, capped by statute at 60 months, three years' supervised release, a $125,000 fine, and a $100 special assessment. App. 200a-201a. On June 26, 2002, the district court sentenced Thurston to three months' imprisonment and 24 months' supervised release (the first three months in home detention[1]), and imposed a $100 special assessment. App. 233a. He was sentenced under the November 1992 Guidelines.

In reaching this sentence, the court departed downward to offense level 10 on two grounds. First, the court departed to effectuate the Guidelines' underlying principles of uniformity and proportionality in sentencing, mitigating the disparity between Thurston's sentence and that of Isola, who the court found to be "the prime architect" of the conspiracy. App. 212a-213a. Consistent with

[1] For the relevant guideline range, supervised release with a condition of home detention is a "substitute" for imprisonment. United States Sentencing Commission, *Guidelines Manual* § 5C1.1(c)(2), (e)(3) (Nov. 1992) [hereinafter U.S.S.G.].

the court's earlier admonition, it found Thurston ineligible for a two-level acceptance-of-responsibility reduction. Thus, despite Thurston's lesser culpability, the court found it appropriate to punish him more severely than Isola, whose offense level was eight. App. 214a-215a.

Second, the court departed downward because "Thurston's record of charitable work and community service is unique, extensive and extraordinary." App. 212a. The court stated: "I think the record should reflect that in over 14 years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church." *Id.* "[T]he evidence reflect[ed] [] that [Thurston] did something more than the usual corporate executive, in [the court's] judgment." *Id.* 207a. There was "no doubt" in the court's mind that Thurston had led "an exemplary life" and "fit in to an unusual category." *Id.* 207a, 231a.

The court withheld ruling on two other departure grounds Thurston advanced: (1) a sentence enhancement for loss under Guideline § 2F1.1(b)(1) would overstate the seriousness of the offense, G. App. 128-135, and (2) aberrant behavior, G. App. 141-146.

The government appealed the sentence; Thurston cross-appealed. Thurston began serving his sentence on August 30, 2002, after the district court denied his motion to stay his sentence pending appeal.

On April 30, 2003, the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, was enacted—ten months after Thurston was sentenced, eight months after he began serving his sentence, two months after he completed his term of imprisonment and home detention, and after regular appellate briefing was completed. Section 401 of the Act, commonly known as the Feeney Amendment, made dramatic changes to the sentencing regime through statutory and Guidelines amendments, including: (1) requiring a sentencing court to state its reasons for departing from the guideline range "with specificity in the written order of judgment and commitment," rather than simply to state its reasons in open court, § 401(c)(1) (amending

18 U.S.C. § 3553(c)); (2) changing the appellate standard of review for whether a downward departure is warranted in a particular case from "due deference" (abuse of discretion) to "de novo," § 401(d)(2) (amending 18 U.S.C. § 3742(e)); and (3) prohibiting a sentencing court from considering departure grounds on remand that were not "specifically and affirmatively included in the written statement of reasons required by § 3553(c) in connection with the previous sentencing of the defendant prior to the appeal" and "held by the court of appeals, in remanding the case, to be a permissible ground of departure," § 401(e) (adding 18 U.S.C. § 3742(g)).

In its initial decision, the First Circuit applied the Act, rejecting Thurston's retroactivity and constitutional objections. App. 102a-117a. The court affirmed the conviction but vacated the sentence, and rejected the downward-departure rationale and order of no fine. It remanded, directing imposition of the statutory maximum five-year prison term and a fine. *Id.* 118a-119a.

In response to this decision, the district court issued a memorandum and order reiterating the grounds for departure, App. 130a, and stating that *de novo* review "renders the trial judge superfluous . . . notwithstanding the fact that [he] possesses deep understanding of the case based on knowledge acquired from presiding at two complex criminal jury trials." *Id.* 132a n.4. The judge recused himself, stating "[he was] disinclined to mechanically impose a sentence" mandated by the court of appeals "which is clearly contrary to the objective of the sentencing guidelines and which severely punishes a defendant for exercising a constitutional right. The government should be prohibited from inflicting a harsh and punitive penalty on any citizen for the exercise of a fundamental right." *Id.* 132a (footnote omitted).

On February 4, 2004, the court of appeals issued a new opinion that again applied the Act, and reached the same result, reversing the district court's departure on both grounds, and remanding for imposition of the statutory maximum five-year prison term and a fine. App. 63a-64a. The court conceded that "the Act does not expressly say that its de novo review provision applies to pending appeals," but nevertheless

concluded that "the new statute applies to appeals pending as of the effective date of the statute." *Id.* 39a-40a. The court appears to have reasoned that the *de novo* review provision "regulate[s]" "conduct . . . of the courts of appeals," and since "that involves conduct dating from April 30, 2003 forward," the provision should be applied to pending appeals. *Id.* 40a.

The court disagreed with Thurston's statutory construction argument. App. 39a. He had argued that Congress clearly intended the Act to apply prospectively, not to post-sentencing cases pending on appeal on the date of enactment.

The court of appeals also rejected, or in some instances failed to address, Thurston's arguments that applying the new standard-of-review and departure-on-remand provisions would run afoul of this Court's retroactivity jurisprudence, and contravene *ex post facto* and due process principles. Characterizing *de novo* review under 18 U.S.C. § 3742(e) as "procedural," the court concluded the change "upsets no legitimate reliance interest by a defendant." *Id.* 40a-41a. Likewise, the court applied newly added § 3742(g) by remanding for imposition of the statutory maximum sentence rather than for further sentencing proceedings. App. 63a.

The First Circuit held that departing to mitigate the wide disparity between Isola's and Thurston's sentences based on principles of uniformity and proportionality was improper. "As the law of this circuit makes clear, basing the departure on grounds of disparity in sentence alone between Thurston and Isola was beyond the district court's authority." App. 54a. "The downward departure based on disparity in sentences among co-defendants was impermissible." *Id.* 55a. The court erroneously concluded that Isola was "a *cooperating* co-conspirator who pled guilty." *Id.* 53a-54a (emphasis added).

Applying the Act's new standard of review, the court decided *de novo* that Thurston's lifetime of charitable work and community service was not "exceptional enough" to justify a departure. App. 57a. The First Circuit ruled that the statute's bifurcated standard of review—clear-error review of "findings of fact," and *de novo* review of whether the ground for departure is "justified by the facts of the case"—prohibited the court of appeals from giving deference to anything other

than "findings of historical fact." *Id.* 52a. The court of appeals gave no weight to the district court's findings or inferences drawn from 14 years' experience sentencing defendants.[2] And it interpreted the new *de novo* review provision as authorizing consideration not only of "the facts of the case" but also of "the intentions of the Commission," "the purposes of sentencing," "the goals of the guidelines," "other policy considerations," and "other extra-record considerations." *Id.* 44a, 49a-50a. "Nothing in the statute purports to constrain the sources that the reviewing court may consider." *Id.* 50a.

The First Circuit denied Thurston's petition for rehearing, App. 134a, but stayed its mandate. Order (Apr. 2, 2004).

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Decision Implicates Important Questions Concerning the Application of the PROTECT Act to Cases Involving Pre-Act Sentencings, and Conflicts With Decisions of This Court and Other Circuit Courts.

A. Applying the Act's Departure-On-Remand and *De Novo* Review Provisions to a Pending Appeal Conflicts With This Court's Statutory Construction and Retroactivity Doctrines.

This case "presents a recurring question in the law: When should a new federal statute be applied to pending cases?" *Martin v. Hadix*, 527 U.S. 343, 352 (1999). To answer this question, a court's first task is to determine "'whether Congress has expressly prescribed the statute's proper [temporal] reach.'" *Id.* (quoting *Landgraf v. USI Film Prods.*,

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[2] *See, e.g.*, App. 207a, 212a (district court's statements at sentencing). The district court issued no written findings, and its "Statement of Reasons" merely sets forth the sentence rather than stating any reasons for imposing it. App. 127a-128a. An excerpt of Thurston's sentencing memorandum containing a partial summary of Thurston's activities is reprinted in the Appendix at 177a-198a.

511 U.S. 244, 280 (1994)). If there is no such congressional directive, a court must determine whether application of the statute "would result in retroactive effect." *Id.* If so, then the "traditional presumption" against retroactive legislation applies, and the statute must not be applied to the pending case. *Id.* That presumption "is deeply rooted in [the Court's] jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "It is [] not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution[,]" including the *Ex Post Facto* and Due Process Clauses. *Id.* at 266-67. Thus, before a statute will be applied retroactively, it must contain an "unambiguous directive" or "express command." *Landgraf*, 511 U.S. at 263, 280; *Martin*, 527 U.S. at 354.

1. The First Circuit's abbreviated analysis of the Act's applicability to pending appeals, App. 39a-41a, runs counter to this Court's precedent, and turns the presumption against retroactivity on its head. No clear language evidences congressional intent that the Act be applied to a post-sentencing case pending on appeal at enactment. The court conceded this: "the Act does not expressly say that its de novo review provision applies to pending appeals." Undeterred, the court pointed, without citation, to "an effective date of April 30, 2003." *Id.* 39a. But, as the court then conceded, "[t]he effective date of a statute does not by itself establish that it has any application to conduct that occurred at an earlier date." *Id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 317 (2001)). The court nevertheless erroneously "agree[d] with the Eighth Circuit that the new statute applies to appeals pending as of the effective date of the statute."[3] *Id.* 40a.

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[3] Although other circuits have ruled that the *de novo* review provision applies to pending cases, they failed to analyze meaningfully Congress's intent regarding the Act's temporal scope, and to address the strong statutory construction arguments presented here, *infra*, in favor of prospective application. *See, e.g.*, *United States v. Kostakis*, 364 F.3d 45, 51 (2d Cir. 2004); *United States v. Bell*, No. 03-20194, 2004 WL 1114580, *1-2 (5th Cir. May 19, 2004); *United States v. Phillips*, 367 F.3d 846, 860-61 (9th Cir. 2004); *United States v. Saucedo-Patino*, 358 F.3d 790, 792-93

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Contrary to the First Circuit's conclusion, the statutory language makes clear that Congress intended the Act to apply only to appeals arising from sentences entered after April 30, 2003. For example, although Congress specifically made *certain* provisions effective upon enactment, *e.g.*, § 401(j)(1) (addressing amendments, inapplicable here, made by § 401(b), (g), and (i)), Congress chose *not* to do the same for the provisions at issue here: § 401(d) (standard of review) and § 401(e) (sentencing on remand). "If . . . Congress was reasonably concerned to ensure that [one section of a statute] be applied to pending cases, it should have been just as concerned about [another related section]." *Lindh v. Murphy*, 521 U.S. 320, 329 (1997) ("Nothing, indeed, but a different intent explains the different treatment.").

Additionally, Congress enacted several interrelated statutory amendments demonstrating that it intended the Act to apply only to appeals of sentences entered after April 30, 2003. In one subsection of the Act, Congress amended 18 U.S.C. § 3553(c)(2) to require a sentencing court to state its reasons for departing from the guideline range in writing and with specificity. Pub. L. No. 108-21, § 401(c). Congress simultaneously incorporated that new written-statement requirement into other provisions covering appellate review and resentencing on remand. *Id.* § 401(d)(1) (amending 18 U.S.C. § 3742(e)(3)); *id.* § 401(d)(3)(C) (amending 18 U.S.C. § 3742(f)(2)); *id.* § 401(e) (adding new 18 U.S.C. § 3742(g)). If Congress had not intended the Act to apply only to appeals of post-Act sentences, this cluster of coordinated amendments

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(11th Cir. 2004); *United States v. Stockton*, 349 F.3d 755, 764 n.4 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1695 (2004); *United States v. Mallon*, 345 F.3d 943, 946-47 (7th Cir. 2003); *United States v. Hutman*, 339 F.3d 773, 775 (8th Cir.), *cert. denied*, 124 S. Ct. 842 (2003); *United States v. Andrews*, 353 F.3d 1154, 1155 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 1696 (2004). Further, these courts read too narrowly this Court's retroactivity and *ex post facto* jurisprudence, often giving conclusive effect to a summary characterization of the Act's changes as procedural rather than substantive.

would make no sense. For example, it would be nonsensical to direct the court of appeals to determine whether "the district court failed to provide the written statement of reasons required by section 3553(c)," *id.* § 401(d)(1), when, prior to the Act, no such written statement was required.

Congress's intent is also evidenced by the language of new 18 U.S.C. § 3742(g)(1), which requires resentencing to conform to the Guidelines "in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date." Because it was through the Act that Congress first directly amended the Guidelines,[4] this language indicates its intent that the limitations on the scope of remand would apply only to cases originally sentenced under the Act. This also demonstrates that Congress intended to avoid any retroactive effects. It would be absurd to apply the November 1992 Guidelines at both initial sentencing and on remand, and, at the same time, apply the new standard of review on appeal and the new departure restrictions on remand.

2. Although the court of appeals concluded that Congress intended these provisions to apply to pending appeals, it went further and opined that applying the Act's new standard of review had no retroactive effect. According to the court, *de novo* review is "procedural," and thus this change "upsets no legitimate reliance interest by a defendant; it could not have induced alteration of the behavior that led to the crime." App. 40a-41a.

This analysis conflicts with this Court's retroactivity decisions. *De novo* review of departure determinations cannot be neatly categorized as "merely procedural in a strict sense." *See Lindh*, 521 U.S. at 327. The new standard of review goes to the heart of sentencing, and has been a matter of grave concern because it "carries further the attenuation of the capacity of

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[4] Every pre-Act amendment located was promulgated by the Commission, submitted to Congress, and took effect unless Congress modified or disapproved it, as provided by 28 U.S.C. § 994(o)-(p).

federal judges to do their work properly," *In re Sentencing*, 219 F.R.D. 262, 262 (E.D.N.Y. 2004), by "mov[ing] the various appellate courts from their traditional function of reviewing to the front lines of determining sentences *de novo*" even though "district courts enjoy . . . a distinct institutional advantage over appellate courts in determining sentences." *United States v. Stultz*, 356 F.3d 261, 264 (2d Cir. 2004).

Additionally, the court's rationale rests on both a false dichotomy and too narrow a view of this Court's retroactivity decisions. Although procedural rules "regulate secondary rather than primary conduct," and the attendant reliance interests are often "diminished," *Landgraf*, 511 U.S. at 275, this Court "cautioned that 'the mere fact that a new rule is procedural does not mean that it applies to every pending case,'" and "took pains to dispel the 'sugges[tion] that concerns about retroactivity have no application to procedural rules.'" *Martin*, 527 U.S. at 359 (quoting *Landgraf*, 511 U.S. at 275 n.29). "When determining whether a new statute operates retroactively, it is not enough to attach a label (*e.g.*, 'procedural,' 'collateral') to the statute; we must ask whether the statute operates retroactively." *Id.* This is a "commonsense, functional judgment . . . informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* at 357-58 (quoting *Landgraf*, 511 U.S. at 270).

These important considerations are undermined when the Act's sentencing provisions are applied in a pending appeal where sentence was imposed under the pre-Act regime. This case is a perfect example. Thurston had no notice of this major shift in the balance of powers between district and appellate courts, expected that the abuse-of-discretion standard would apply on appeal, and reasonably relied on it. Had the court of appeals reviewed the district court's prior-good-works departure for abuse of discretion, the departure would certainly have been affirmed. Instead, the government had a second chance to argue against the departure, with no deference given to the district court. Had Thurston known at sentencing that, instead of showing deference to the trial judge who had a superior "feel" for the case, an appellate court would be required to conduct a *de novo* departure determination based on a cold record, he would likely have made different choices, for example, requesting an

evidentiary hearing or extensive written findings and reasons. Moreover, had Thurston known this before trial, he may well have been more receptive to the government's plea offer.

The court ignored Thurston's argument that newly enacted 18 U.S.C. § 3742(g) is impermissibly retroactive. That provision precludes a district court from departing downward on remand on grounds that were not "specifically and affirmatively included in the written statement of reasons required by § 3553(c) in connection with the previous sentencing of the defendant prior to the appeal" and "held by the court of appeals, in remanding the case, to be a permissible ground of departure." 18 U.S.C. § 3742(g)(2). The First Circuit applied § 3742(g) by directing the district court to impose a five-year prison term, rather than remanding for further sentencing proceedings. App. 63a-64a. At the initial sentencing, the district court withheld ruling on two strong departure grounds Thurston had advanced. It was reasonable to expect that neither Congress nor the courts would subsequently strip him of his right to proffer those grounds again on remand if he were to lose on appeal.[5] Had he known the Feeney Amendment was coming, he would have pushed harder for a ruling on the other departure grounds, and argued their merits on appeal. Indeed, the First Circuit noted that the evidence of Thurston's impeccable character, honesty, and integrity is relevant to the "aberrant behavior" departure ground, but that that ground was not at issue on appeal. App. 56a.

The facts in this representative case are even more compelling than those in other cases in which this Court has held statutes inapplicable to pending cases because of the statutes' retroactive effect. *See St. Cyr*, 533 U.S. at 324-25 (holding that a statute removing the mere possibility of

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[5] *United States v. Limberopoulos*, 26 F.3d 245, 251 (1st Cir. 1994) ("Departure decisions are for the sentencing court in the first instance. On remand, the district court remains free to consider departure for other reasons."); *see also United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999) (sentencing arguments may be raised on remand unless waived or barred by law of case).

discretionary relief from non-punitive deportation for aliens who entered into pre-enactment plea agreements had retroactive effect because aliens relied on that possibility); *Martin*, 527 U.S. at 349-50, 358-60 (holding that a statute regulating attorneys' fees in prison litigation suits, effectively reducing the hourly rate, had retroactive effect as to pre-enactment work because it violated attorneys' expectations and attached new legal consequences to their conduct); *Landgraf*, 511 U.S. at 281-85 (holding that a statutory provision authorizing compensatory damages for civil liability had an impermissible retroactive effect because fairness concerns, although attenuated, would not be entirely absent, and there would be an element of surprise). The First Circuit's holding cannot be reconciled with these precedents.

This Court should grant certiorari, and hold that newly enacted 18 U.S.C. § 3742(g) and amended § 3742(e) may not be applied to pending cases. Congress intended the Act to apply prospectively. Alternatively, these provisions would have an impermissible retroactive effect absent a clear Congressional statement in favor of retroactivity, and therefore the antiretroactivity presumption should apply.

B. Applying the Act's Departure-On-Remand Provision to a Pending Appeal Conflicts With Decisions of the Second and Eighth Circuits.

Shortly after the First Circuit's retroactive application of § 3742(g) in this case, *see supra* § I(A), the court reaffirmed its position in *United States v. Martin*, 363 F.3d 25 (1st Cir. 2004). The *Martin* court explicitly held § 3742(g), which "bars new departures on remand," is a "procedural change" that applies to all cases pending on April 30, 2003, the enactment date. *Id.* at 36 n.18; *id.* at 40 & n.26. Martin, like Thurston, was sentenced long before April 30, 2003.

Apparently the court viewed the retroactivity analysis for the departure-on-remand provision to be no different from the analysis for the *de novo* review provision.[6] *See id.* at 36 n.18 (citing section of opinion addressing applicability of § 3742(e)); *id.* at 40 n.26 (same). In *Martin*, the court held that applying the new appellate review standard to a pending case would not violate this Court's retroactivity jurisprudence. *Id.* at 45-46.

The First Circuit's decisions in this case and *Martin* conflict with contrary holdings of the Second and Eighth Circuits. In *United States v. Kostakis*, 364 F.3d 45 (2d Cir. 2004), the court ruled that because § 3742(g) "limits the authority of a district court to impose a sentence outside the applicable Guideline range upon a remand from a court of appeals," the provision "cannot apply in this case without invoking serious constitutional concerns." *Id.* at 53. "The district court did not make a specific ruling on, much less adopt in a written statement of reasons, [the defendant's] other motions for departure at his initial sentencing." *Id.* The *Kostakis* court's reasoning applies equally here:

> A strict application of the PROTECT Act would preclude the sentencing court from considering these alternative grounds for departure on remand because they were never "specifically and affirmatively included in the written statement of reasons." Plainly, this omission occurred because such statutory limitations did not exist at the time of [the defendant's] initial sentencing and therefore neither [the defendant] nor the sentencing court were aware that these grounds could be precluded on remand.

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[6] The court made an exception to the applicability of § 3742(g) for a "departure[ ] necessary to satisfy the double jeopardy crediting requirement," which "can arise, by its very nature, only upon resentencing after appeal, and thus could not have been listed in the original statement of reasons." *Id.* at 40.

Id. Accordingly, the Second Circuit held: "the sentencing court on remand may consider these alternative grounds for departure, which were initially raised by [the defendant] below." *Id.*

Similarly, in *United States v. Cole*, 357 F.3d 780 (8th Cir. 2004), the Eighth Circuit "h[e]ld section 3742(g)(2) does not require the district court to impose a sentence limited only to the grounds identified in a prior section 3553(c) written statement because the court was not required to make the section 3553(c) written statement in December 2002 when it sentenced [the defendant]." *Id.* at 786 (citation omitted). Thus, the court of appeals remanded for the district court to consider a departure and "conduct[] whatever further factfinding it deems appropriate." *Id.* at 785-86.

After deciding *Thurston* and *Martin*, and following *Kostakis* and *Cole*, the First Circuit apparently changed course. *See United States v. Derbes*, No. 03-2067, 2004 WL 1197380, *5 (1st Cir. May 27, 2004). In *Derbes*, the First Circuit ruled: "it would make no sense to apply section 3742(g)(A) [sic] retroactively to sentences imposed before its enactment" because the written-statement requirement was not then in effect.[7] *Id.* The court remanded for resentencing, and authorized the district court to consider a departure on a ground the defendant had raised at initial sentencing, even though the ground was not included in the written statement of reasons now required by § 3553(c). The court's apparent change in course, however, does not resolve the erroneous holding in Thurston's case.

This Court should grant certiorari, hold that § 3742(g) may not be applied to pending cases, reverse the court of appeals' judgment, and remand for further proceedings.

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[7] It is impossible to reconcile this reasoning with the First Circuit's conclusion that § 3742(e) applies to pending cases. Section 3742(e), like § 3742(g), refers to the written-statement requirement of § 3553(c). 18 U.S.C. § 3742(e)(3)(A). Thus, it "makes no sense" to apply the *de novo* review provision to sentences imposed before enactment.

C. Retroactive Application of the Act's Departure-On-Remand Provision Presents a Novel and Important Question Under This Court's *Ex Post Facto* Doctrine.

Although the Court should not need to reach the issue, this case presents the novel and important question whether applying § 3742(g), the new departure-on-remand provision, in any case where sentencing occurred before its enactment would violate the *Ex Post Facto* Clause. Specifically, the question is whether § 3742(g) falls within the third *Calder v. Bull* category, which prohibits statutes that retroactively increase the punishment for a crime. *See Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990) (discussing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

The Court has explained that it will not invalidate legislative changes solely on the ground that they "create some speculative, attenuated risk of affecting a prisoner's actual term of confinement." *California Dept. of Corrs. v. Morales*, 514 U.S. 499, 508-09 (1995). But the Court has also "long held that the question of what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree.'" *Id.* at 509 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)) (emphasis in original). Thus, the analysis depends on "whether [a statute] produces a sufficient risk of increasing the measure of punishment." *Id.*; *see also Garner v. Jones*, 529 U.S. 244, 251 (2000) ("The question is whether the amended [rule] creates a significant risk of prolonging [a defendant's] incarceration."). "[B]y simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Collins*, 497 U.S. at 46.

The conspiracy, under the government's theory, ended in 1993. Accordingly, Thurston was sentenced under the November 1992 version of the Guidelines. *See* U.S.S.G. § 1B1.11 (if using Guidelines in effect on date of sentencing would violate *Ex Post Facto* Clause, court shall use Guidelines in effect on date offense committed). The PROTECT Act, enacted April 30, 2003, made dramatic changes to the sentencing regime, as compared to the regime in place in

2002 when Thurston was sentenced, let alone in 1993. Undoubtedly the Act has made the sentencing regime more onerous for defendants, and for Thurston in particular. The overarching purpose of the Feeney Amendment was, after all, to reduce the incidence of downward departures. *See, e.g.*, H.R. Conf. Rep. No. 108-66, at 58-59 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 693-94.

Section 3742(g) prevents Thurston from receiving a departure on alternative grounds on remand, even though the district court withheld ruling on two such grounds at initial sentencing. Absent the application of § 3742(g), he could have urged the district court on remand to consider other grounds for departure. Thus, although Congress did not increase the maximum sentence for violating 18 U.S.C. § 371, the Act creates a significant risk of increasing the actual term of imprisonment for Thurston and other defendants whose initial sentencings took place before the Act.

This Court's *ex post facto* decisions have never addressed precisely this sort of provision, but the Court has invalidated laws in analogous or less compelling circumstances. *See, e.g.*, *Lindsey v. Washington*, 301 U.S. 397 (1937) (statute removed discretion of judge, making mandatory what before was only discretionary maximum sentence); *Weaver v. Graham*, 450 U.S. 24 (1981) (statute reduced good-conduct credits available to inmates, effectively increasing time in prison before early release); *Miller v. Florida*, 482 U.S. 423 (1987) (sentencing guidelines increased "primary offense points" for sexual offenders, which thereby increased presumptive sentencing ranges, making punishment sufficiently more burdensome even though defendant could not show definitively he would have received lesser sentence under earlier guidelines); *Lynce v. Mathis*, 519 U.S. 433 (1997) (statute canceled early-release credits given to inmates to ease prison overcrowding). This case presents a novel fact pattern in which to apply the test of "whether [a statute] produces a sufficient risk of increasing the measure of punishment." *Morales*, 514 U.S. at 509; *see also supra* § I(B) (discussing *Kostakis*, 364 F.3d at 53 (holding § 3742(g) "cannot apply in this case without invoking serious constitutional concerns")).

II. This Case Presents Important Questions Concerning the Nature and Scope of *De Novo* Review Under the PROTECT Act That Will Affect All Appeals of Departures.

The First Circuit set a troubling precedent by claiming virtually unlimited power under the Act's *de novo* review provision to consider extra-record sources that district courts are prohibited from considering when making departure decisions in the first instance. The First Circuit also construed the Act as requiring a total disregard for the district court's experience, expertise, and unique vantage point in matters of sentencing, or for any findings other than "historical facts." If this Court were to hold the Act applies here, further review is necessary to reverse the erroneous decision below, and to provide guidance to appellate courts struggling to understand and carry out their new responsibilities.

A district court may depart from the applicable guideline range if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b)(1). To determine whether a circumstance was adequately taken into consideration, courts must "consider *only* the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* (emphasis added). Newly enacted § 3742(e)(3)(B)(iii) directs the court of appeals to determine whether the departure is "based on a factor that . . . is not justified by the facts of the case."

Despite the language of § 3553(b)(1), the court of appeals interpreted its new mandate under § 3742(e)(3)(B)(iii) as authorizing consideration not only of "the facts of the case" but also of "the intentions of the Commission," "the purposes of sentencing," "the goals of the guidelines," "other policy considerations," and "other extra-record considerations." *Id.* 44a, 49a-50a. Indeed, the court asserted: "Nothing in the statute purports to constrain the sources that the reviewing court may consider." *Id.* 50a.

In this case, rather than considering only the sources identified in § 3553(b)(1), and the case law interpreting and applying § 3553(b)(1), the First Circuit relied on law review articles and Senate testimony to define the Commission's intent, invoked the Sarbanes-Oxley Act of 2002 to "underscore[] Congress's disinclination towards leniency for white collar criminals," and purported to weigh Thurston's good works against the social ills caused by health care fraud, citing a magazine article and statistics. App. 59a-61a. The opinion cited few specific record facts, which were secondary to the "highly relevant" goal of mitigating the disparity between "white collar" and "blue collar" crimes. "Against that background," according to the court, "the nature of Thurston's offense mitigates [sic] against concluding that his good works are 'exceptional.'" *Id.* 59a-60a. Under the court's analysis, "Thurston's executive position" and "resources" also "seriously undercut[]" his claim that a departure is justified. App. 61a.

As part of its expansive view of *de novo* authority under the Act, the court held that § 3742(e) prohibits it from giving any weight to the district court's findings or conclusions, with the exception of "findings of historical fact." App. 52a. This is wrong for two reasons.

First, the court of appeals' construction conflicts with the statute's plain language. Even as amended, § 3742(e) requires appellate courts to "give due regard to the opportunity of the district court to judge the credibility of the witnesses, and [to] accept the findings of fact of the district court unless they are clearly erroneous." Deference is not narrowly limited to "findings of historical fact." The First Circuit gave no deference to the following statements of the district court, which are best characterized as "findings of fact" rather than applications of law to fact: "Thurston's record of charitable work and community service is unique, extensive and extraordinary"; "in over 14 years of sentencing defendants, . . . no one had a more extraordinary devotion to charitable work[] [and] community service"; he "fit in to an unusual category" in this regard; and "he did something more than the usual corporate executive." App. 207a, 212a.

Second, *de novo* review under § 3742(e) does not mean that appellate courts are to give absolutely no weight or deference to the district court's law-to-fact application. The prior standard of review, "due deference," had been interpreted to mean "abuse of discretion." *Koon v. United States*, 518 U.S. 81, 96-100 (1996). So one must conclude that Congress intended to give appellate courts more power than the highly deferential abuse-of-discretion standard conferred. But this Court has made clear that in certain circumstances *de novo* review must entail some level of deference. In *Ornelas v. United States*, 517 U.S. 690 (1996), the Court held that questions of reasonable suspicion and probable cause under the Fourth Amendment should be reviewed *de novo*. The Court explained that *de novo* review required appellate courts to "give due weight to inferences drawn from [historical] facts by resident judges and local law enforcement officers." *Id.* at 699. Because they have special insights based on their vantage point, experience, and expertise, their inferences "deserve deference." *Id.* "The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts." *Id.* at 700. The judiciary should presume that Congress incorporated this common-law meaning of "*de novo*" into § 3742(e), and that Congress expected the statute to be read in conformity with *Ornelas*. *See United States v. Wells*, 519 U.S. 482, 491, 495 (1997).

As in probable-cause inquiries, this moderate level of deference is essential in fact-intensive departure inquiries, where district courts have a "special competence [] about the 'ordinariness' or 'unusualness' of a particular case," *Koon*, 518 U.S. at 99 (quoting *United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993)), a unique "vantage point," *id.* at 98, and "an institutional advantage over appellate courts." *Id.* This case is illustrative. The district judge had the experience and expertise gained from 14 years on the bench sentencing an array of defendants. Moreover, he had a superior vantage point, having observed Thurston at trial, where he testified at length, and at sentencing, where he made a statement before the court.

The Court should hold that district courts' long-recognized experience, expertise, and unique vantage point carry some weight when courts of appeals exercise *de novo* review of departure decisions. Further, as discussed above, this Court's guidance is needed to make clear that although Congress has granted *de novo* authority to appellate courts, they have a corresponding responsibility to limit their consideration of whether a departure is "justified by the facts of the case" to the extra-record sources that district courts are entitled to consider under § 3553(b)(1).

III. This Court Should Resolve the Circuit Conflict Regarding the Circumstances in Which District Courts Have Discretion To Depart Based on Disparity Between Co-Defendants' Sentences.

A district court has authority to depart from the applicable guideline range under 18 U.S.C. § 3553(b). "Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance." U.S.S.G. § 5K2.0. Except for expressly prohibited departure grounds, "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Id.* ch. 1, pt. A, intro. comment., at 6. Sentencing disparity is not a prohibited factor, and therefore cannot be categorically precluded. *Koon*, 518 U.S. at 106.

In this case, the court of appeals held that the district court exceeded its authority because no circumstances justified a departure based on the disparity between Thurston's five-year prison sentence and Isola's three-year probationary sentence. App. 54a-55a. As Thurston urged, and the district court made clear, unusual circumstances justify a departure here: the government's manipulation of the Guidelines prejudiced Thurston, and, absent a departure, Thurston would be punished more severely because he exercised his constitutional right to trial. *See infra* § III(B).

The Court should resolve the circuit courts' conflicting positions on disparity-based departures, and make clear that sentencing courts retain the discretion to depart in circumstances such as these. There is a particular need for discretion in cases where, as here, prosecutors engage in the common but improper (and hidden) practice of "fact bargaining" with a pleading co-defendant, and later punish a similarly situated co-defendant who elects to stand trial by representing there to be different relevant facts for purposes of sentencing.

A. The Circuit Courts Have Taken Conflicting Positions on Disparity-Based Departures.

Since 1991, the First Circuit has held that sentencing judges are precluded from departing downward based on the disparity between sentences of similarly situated co-defendants. App. 54a-55a. While the First Circuit has sometimes qualified its position by stating that such a departure is precluded "without more," *id.* 55a (quoting *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991)), the court has never found this "more" to be present in a particular case. Based on the reasoning of *Wogan*, the circuit's leading case, a departure would be upheld only if a defendant could establish a disparity between "'the defendant's sentence and that of all similarly situated defendants throughout the country.'" *See Wogan*, 938 F.2d at 1448-49 (quoting *United States v. Joyner*, 924 F.2d 454, 460-61 (2d Cir. 1991)).

Thurston unsuccessfully urged the court of appeals to uphold the district court's disparity-based departure, particularly in light of this Court's decision in *Koon*, 518 U.S. 81 (1996), which set forth the framework for analyzing departures. Following *Koon*, other circuit courts have held that departures based on disparity between co-defendants' sentences are not categorically precluded. The First Circuit's approach conflicts with decisions of its sister circuits.

In *United States v. Wright*, 211 F.3d 233 (5th Cir. 2000), the Fifth Circuit held that the sentencing court erroneously believed it lacked the authority to depart on the basis of

sentencing disparity between co-defendants, and remanded for resentencing. *Id.* at 238-39. The Fifth Circuit noted that, when the Seventh Circuit previously had categorically denied departures based on discrepancies among co-defendants' sentences, this Court vacated and remanded for reconsideration in light of *Koon*. *Id.* (citing *United States v. Meza*, 127 F.3d 545 (7th Cir. 1997)).

Similarly, the Ninth Circuit held that, in light of *Koon*, a departure "to equalize sentencing disparity" is proper under the appropriate circumstances, *United States v. Daas*, 198 F.3d 1167, 1180-81 (9th Cir. 1999), so long as the co-defendants have been convicted of the same offense. *United States v. Caperna*, 251 F.3d 827, 831 (9th Cir. 2001). That court stated that a departure on disparity grounds could be warranted even where the co-defendant "cooperated with the government and the defendant did not," and concluded "that the decision whether to depart based on sentence disparity among cooperating and non-cooperating defendants is properly left within the sound discretion of the sentencing judge." *Id.* at 831-32. "[T]he sentencing judge is in the best position to identify those exceptional instances and to explain on the record why a departure is warranted." *Id.* at 832.

Even before *Koon*, the Sixth Circuit likewise held that sentencing courts "are not precluded *as a matter of law* from departing from the guidelines in order to generally conform one conspirator's sentence to the sentences imposed on his co-conspirators." *United States v. Nelson*, 918 F.2d 1268, 1273 (6th Cir. 1990) (emphasis in original). Recognizing that such a departure would occur only in the unusual case, the court nonetheless acknowledged that "district courts enjoy a unique role in applying the guidelines" by "fitting flesh and blood defendants within a theoretical framework that attempts to quantify attitude, behavior, culpability, and a myriad of subjective characteristics objectively." *Id.* at 1272-73. After *Koon*, the Sixth Circuit reaffirmed that "unjustified" disparities could provide an appropriate basis for departure. *United States v. Walls*, 293 F.3d 959, 969-70 (6th Cir.), *cert. denied*, 537 U.S. 1022 (2002).

The Eighth Circuit also stands in conflict with the First Circuit's decision here. In *United States v. Jones*, 160 F.3d 473 (8th Cir. 1998), that court noted "an emerging trend in which the government secures a substantially reduced sentence for the principals of a drug conspiracy in exchange for their testimony against lesser members of the conspiracy," which "generally results in the principals receiving substantially lower sentences than the lesser members[,] and is yet another example of how the Sentencing Guidelines have transferred the discretion once held by judges to the government." *Id.* at 483 (Heaney, J., writing majority opinion in pertinent part and concurring in part). The court held:

> While courts generally endorse this anomalous by-product of the Sentencing Guidelines, to the extent that the government's behavior directly results in prejudice to a defendant, which is significant enough to take the case out of the heartland of the Sentencing Guidelines, district courts have the discretion to grant an appropriate downward departure.

Id.; *accord United States v. Palmer*, 297 F.3d 760, 763 (8th Cir. 2002), *cert. denied*, 538 U.S. 937 (2003).

In addition to these conflicts, there is tension between the decision below and dicta from decisions in other circuits. The Seventh Circuit in *United States v. McMutuary*, 217 F.3d 477 (7th Cir. 2000), concluded that a disparity between the sentences of co-defendants "ordinarily should not be considered as a factor." *Id.* at 489-90. The court "refrain[ed] from holding, however, that unjustified disparities may never be considered as bases for departure. In certain circumstances, such as when an unjustified disparity is created by the abuse of prosecutorial discretion," the sentencing court may consider a departure. *Id.* at 490. The Fourth Circuit reached the same conclusion. *United States v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992) (departure based on disparity between co-defendants' sentences may be permissible with evidence of prosecutorial misconduct).

This case presents a fact pattern that, while disturbingly common in district courts across the country, is markedly distinct from the vast array of appellate cases holding that sentencing disparity is not a permissible departure ground. A multitude of cases, too numerous to cite here, cover the well-trod terrain of "warranted," or "justified," disparity caused by proper application of the Guidelines to two or more defendants, with no unusual circumstances. Other courts have found disparity to be an insufficient ground for departure in a broad range of circumstances not at issue here, for example, where the pleading defendant has a cooperation agreement with the government, or where the prosecutors act properly within the scope of their legitimate discretion.[8]

Given the conflict among the courts of appeals regarding whether and in what circumstances a court may depart based on sentencing disparity between co-defendants, the Court should issue a writ of certiorari to clarify this important area of sentencing law.

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[8] *See, e.g.*, *Walls*, 293 F.3d 959 (co-defendant cooperated with government and received substantial-assistance departure); *United States v. Caldwell*, 219 F.3d 1186 (10th Cir. 2000) (same); *Meza*, 127 F.3d 545 (same); *United States v. Buckendahl*, 251 F.3d 753 (8th Cir. 2001) (legitimate prosecutorial discretion concerning Guideline § 1B1.8 agreements, short of misconduct, abuse of discretion, or otherwise improper behavior); *United States v. Martin*, 221 F.3d 52 (1st Cir. 2000) (comparison to national median sentence); *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000) (legitimate differences in prosecutorial charging and plea bargaining practices between federal districts); *United States v. Contreras*, 180 F.3d 1204 (10th Cir. 1999) (co-defendant pleaded to lesser charges; no viable claim of misconduct by prosecutors); *United States v. Stanley*, 928 F.2d 575 (2d Cir. 1991) (same); *United States v. Schulte*, 144 F.3d 1107 (7th Cir. 1998) (federal sentence disproportionate with state sentence); *United States v. Carr*, 932 F.2d 67 (1st Cir. 1991) (defendants in different cases); *Wogan*, 938 F.2d 1446 (different drug quantities based on prosecutorial mistake or negligence); *Joyner*, 924 F.2d 454 (different drug quantities based on fortuity of timing of arrests of individuals involved in common scheme).

B. This Court Should Make Clear That a Sentencing Court Has Discretion To Depart When Otherwise a Defendant Would Be Prejudiced by Prosecutorial Manipulation of the Guidelines, or Punished for Exercising the Right to Trial.

As early as 1990, it was clear that a major flaw of the Guidelines system was its "[p]romotion of [h]idden [b]argaining." Rep. of Fed. Cts. Study Comm. (Apr. 2, 1990), *reprinted in* 2 Fed. Sent. Rep. 232, 234 (1990). The Federal Courts Study Committee reported: "the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system." *Id.* The Committee explained that "some prosecutors (and some defense counsel) have evaded and manipulated the guidelines in order to induce the pleas necessary to keep the system afloat." *Id.*

Prosecutors have wide latitude not only in choosing which offenses to charge, but also in negotiating plea agreements. Even as their discretion has expanded, prosecutors have been entrusted with the responsibility to help carry out the "real offense" elements of the Guidelines, including sentencing based on broadly defined "relevant conduct." *See* U.S.S.G. § 1B1.3. The Commission believed "[r]eliable fact-finding" to be a core value of the Guidelines system because it "is essential to procedural due process and to the accuracy and uniformity of sentencing." *Id.* ch. 6, pt. A, intro. comment. As this case exemplifies, however, prosecutors can manipulate the system, "fact bargaining" with one defendant while keeping a co-defendant (as well as the court) "in the dark," *see id.* ch. 1, pt. A, intro. comment., at 7, with no "clear, definite expectation in respect to the sentence that a court will impose if a trial takes place." *See id.*

At Isola's sentencing, armed with the same information as it had at Thurston's sentencing, the government acquiesced in the court's announcement that it intended to impose a probationary sentence, and agreed not only to

waive its right to appeal, but also to forgo a presentence report. This was a tacit representation that such a sentence was fair and appropriate to the nature and severity of the crime charged. Although the First Circuit erroneously concluded that Isola cooperated with the government, App. 53a-54a, there was neither a cooperation agreement nor a substantial-assistance departure. To the sentencing court's statement that it "would [n]ever increase a person's sentence because he exercised his right to go to trial," the government offered no rejoinder. App. 176a. Yet after trial, the government argued vigorously that Thurston should receive a guideline sentence of 78 to 97 months' imprisonment, capped at 60 months by statute, and be fined $125,000. To support its sentencing calculation, the government argued that the relevant conduct associated with the conspiracy included an intended loss of $5,800,000. No such argument was made at Isola's sentencing. Although the transcript of Thurston's sentencing cannot capture the court's demeanor and tone, the prosecutors' tactical switch clearly disturbed the court, and undoubtedly factored into its decision to depart. *See, e.g.*, App. 214a-225a.

In deciding whether to stand trial, Thurston reasonably relied on the prosecutors' implicit representation at Isola's sentencing that they would claim no actual or intended loss associated with the individual co-conspirators' "relevant conduct" under the Guidelines.[9] The government brought no relevant loss information to the court's attention, and, indeed, joined in Isola's "waiver" of a presentence report, even though Congress had long ago abolished the right to waive the requirement. U.S.S.G. § 6A1.1 &

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[9] *See* U.S.S.G. § 1B1.3(a) ("relevant conduct" includes acts and omissions of defendant as well as others in furtherance of conspiracy, and all harm that was the result or object of such acts and omissions); *id.* § 1B1.3, comment. (backg'd) (conduct that is not formally charged or is not an element of the offense may enter into sentencing determination); *id.* § 2F1.1, comment. (n.6) (cumulative loss produced by a common scheme or course of conduct should be used in determining offense level).

comment. If prepared, the report would have addressed whether an enhancement was warranted for amount of loss.

Moreover, it was reasonable to conclude that the government had drawn a distinction between "relevant conduct" attributable to Damon as a corporation, and conduct attributable to individual co-conspirators. Based on the same business practices, the same prosecutors had previously prosecuted Damon and litigated a related civil case. Damon pleaded guilty to one count in violation of 18 U.S.C. § 371, admitted that the company engaged in a fraud of over $25,000,000, was sentenced to pay a fine of over $35,000,000, and agreed to pay over $83,000,000 to the government as a civil settlement and restitution. G. App. 255-288.

If the prosecutors believed there to be loss associated with the individual co-conspirators' conduct, under the Guidelines they were obligated to bring that, and any other relevant information, to the court's attention at Isola's sentencing.[10] The Guidelines are reinforced by the *United States Attorneys' Manual*, which directs prosecutors to "assist the sentencing court by . . . [a]ttempting to ensure that the relevant facts are brought to the court's attention fully and accurately." U.S. Dep't of Justice, *United States Attorneys' Manual* 9-27.710, at 9-249 (2d ed. 2000 & Supp. 2002-1). That responsibility does not "cease[] upon the . . . entry of a guilty plea; to the contrary, the [prosecutor] has a continuing obligation to assist the

[10] *See* U.S.S.G. § 6B1.4(a) (stipulation of facts accompanying plea agreement must set forth relevant facts and circumstances of actual offense conduct, and must not contain misleading facts); *id.* § 6B1.4(b) & comment. (parties should fully disclose actual facts, and then explain to court why disposition of the case should differ from that which such facts ordinarily would require under Guidelines); *id.* § 6B1.2(a) & comment. (even when plea agreement includes dismissal of charge, may not restrict scope of relevant conduct); *id.* § 1B1.8, comment. (n.1) (even when cooperation agreement provides that self-incriminating information will not be used in calculating sentence, Guidelines do not authorize government to withhold information from court).

court in its determination of the sentence to be imposed." *Id.* at 9-250.[11]

The prosecutors disregarded their obligations at Isola's sentencing, and engaged in improper "fact bargaining" to secure an early felony conviction by plea, only to change tactics at Thurston's sentencing, and seek to punish him more severely for rejecting the plea offer and exercising his right to trial. The improper practice of fact bargaining—which is not revealed to the court or to co-defendants—is rampant in the federal courts and has increased sharply in the District of Massachusetts in recent years. *See Berthoff v. United States*, 140 F. Supp. 2d 50 (D. Mass. 2001) (Young, C.J.) (describing fact bargaining and resultant sentencing disparity, and criticizing First Circuit's treatment of the practice).

The government's manipulation of the Guidelines system resulted in actual prejudice to Thurston. Absent a departure, Thurston would be punished more severely because he exercised his right to trial, guaranteed by the Sixth Amendment, rather than plead guilty or *nolo contendere*. He was offered a plea deal similar to Isola's, and the government was prepared not to challenge what it believed would be a probationary sentence. App. 130a, 219a. Moreover, Isola was found to be *more*, not less,

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[11] For other relevant provisions, see *id.* 9-27.720, at 9-250 (prosecutors should cooperate with Probation Service in preparing presentence report, or make factual presentation to court); *id.* 9-27.400, at 9-233 (plea bargaining must honestly reflect totality and seriousness of defendant's conduct and any departure to which prosecutor is agreeing, and must be accomplished through appropriate guideline provisions); *id.* (total amount of money involved in fraudulent scheme will be considered in determining guideline range even if defendant pleads guilty to single count and there is no stipulation as to other counts); *id.* at 9-233-9-234 (spirit of Guidelines and Department policy is violated if prosecutor enters into plea bargain based upon prosecutor's and defendant's agreement that departure is warranted, but does not reveal the departure's existence, and thereby afford court an opportunity to reject it).

culpable than Thurston. As the district court concluded, "it is obvious that this 'wide disparity' in sentences was precipitated by Thurston's exercise of a constitutional right. He was offered by the government and would have received a term of probation by the Court if he had been willing to forego a trial by jury and had pled guilty, as had Isola." App. 131a. "The government should be prohibited from inflicting a harsh and punitive penalty on any citizen for the exercise of a fundamental right." *Id.* 132a; *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) (punishing person for exercising constitutional right violates Due Process Clause).

Prosecutors often exercise their discretion aggressively but legitimately, and courts have little power to check it. However, when exercise of prosecutorial discretion crosses the line into an improper manipulation of the Guidelines, a sentencing court should retain the discretion to depart from the guideline range when necessary to remedy the resulting prejudice to a defendant. *See* John S. Martin, Jr., *The Role of the Departure Power in Reducing Injustice and Unwarranted Disparity Under the Sentencing Guidelines*, 66 Brook. L. Rev. 259 (2000). This is particularly important when a defendant would be punished more severely simply for exercising his constitutional right to trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH P. PUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza, 20th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

June 2004

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United States Court of Appeals
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,

Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,

Defendant, Appellee/Cross-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, *Senior U.S. District Judge*]

Before

Lynch, Lipez, and Howard, *Circuit Judges.*

Michael K. Loucks, Assistant U.S. Attorney, with whom *Michael J. Sullivan*, U.S. Attorney, and *Susan G. Winkler* and *Gary S. Katzmann*, Assistant U.S. Attorneys, were on brief, for appellant.

Matthew D. Brown, with whom *Joseph P. Russoniello* and *Cooley Godward LLP* were on brief, for appellee.

February 4, 2004

LYNCH, *Circuit Judge*. William Thurston, a vice president of Damon Clinical Testing Laboratories, Inc., appeals his conviction for conspiring to defraud the Medicare program of over five million dollars.[1] The charged conspiracy involved the manipulation of physicians into ordering unnecessary ferritin blood tests[2] for Medicare beneficiaries in violation of 18 U.S.C. § 371.

The essence of the scheme charged was that Damon, through Thurston and others, bundled the ferritin blood test – previously ordered by doctors less than two percent of the time – into a panel of blood tests known as the LabScan, which was ordered thirty to forty percent of the time. When doctors or patients (instead of insurers) paid for the bundled LabScan, Damon provided the ferritin test for free, leading doctors to believe there was no extra

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[1] The original panel opinion in this case issued on August 4, 2003. Thurston then filed a petition for rehearing challenging, *inter alia*, our holding that the district court erred in granting a downward departure for good works. The Federal Defender Office and District of Massachusetts Criminal Justice Act Board filed an amicus brief in support of Thurston's petition, arguing that the panel had misconstrued the de novo review provisions contained in § 401 of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650. We asked for the government's response, which we received on November 18, 2003.

The arguments persuaded the panel that certain revisions to the original discussion of the effects of the PROTECT Act on Thurston's good works departure were appropriate. Accordingly, we have withdrawn our prior opinion and substituted this one. The discussion of the PROTECT Act is revised; the remaining portions of the original opinion are essentially unchanged.

[2] The ferritin iron test measures the number of atoms per molecule of circulating ferritin. Ferritin is a binding protein that delivers iron to iron storage cells.

charge for this test. Doctors were not told that, when Medicare paid for the bundled LabScan, Medicare was charged extra for the ferritin test. Indeed, both a letter and marketing materials indicated the added ferritin test was "free"; that is, that there was no charge beyond the standard LabScan charge. Those unnecessary ferritin tests were not free to Medicare. Damon charged Medicare roughly $21 per ferritin test on top of the approximately $24 charged for the LabScan. Nor were doctors told that the ferritin test could be ordered separately; the test requisition form did not offer that option. The physicians, then, were induced to order and to certify as medically necessary a large number of ferritin tests that were not medically necessary.

The government's theory was that Damon did this to offset Medicare's 1988 reduction in reimbursement rates of sixteen percent, which was projected to cause Damon an estimated annual loss of $800,000 in revenues. In just one of Thurston's labs, the orders for ferritin tests were expected to increase from approximately three hundred per month to roughly ten thousand per month. Thurston testified that he was innocent, and that he neither had knowledge of nor responsibility for key components of the conspiracy. The jury disagreed.

Although the sentencing guidelines called for a sentence of sixty-three to seventy-eight months, the district court sentenced Thurston to only three months' imprisonment. It did so by granting a downward departure to "correct" a perceived disparity between a five-year sentence of imprisonment for Thurston and the sentence of three years' probation given to the company president, Joseph Isola, who had pled nolo contendere and assisted the government. Its second ground for departure was its

sense that the good works Thurston did for his church and community were extraordinary.

This sentence outraged the prosecutors, who appealed, arguing that the district court lacked the power to depart downward for any of the reasons it gave, and that, even if a departure were appropriate, the extent of the departure was excessive. The government also appeals the district court's failure to impose a fine, on the basis that the sentencing guidelines, if not the statute, mandated a fine. Finally, the prosecution argues that if some departure for good works was warranted, the district court was required to address an issue it avoided: the government's request for an upward departure on the ground that Thurston had obstructed justice by committing perjury on the witness stand.

Thurston also appeals, arguing that the conviction must be vacated because the prosecution was barred by the statute of limitations, because he was entitled to a jury instruction and to acquittal on the basis that he reasonably interpreted the law to mean he could rely on the physicians' certifications of medical necessity, and because of other errors. In addition, Thurston argues that his sentence was too high because his base offense level calculation depended on an amount of loss, either actual or intended, that was unproven and excessive. Thurston also defends the downward departure.

Several important issues are raised by these appeals. The government's appeal requires us to address the effect of the new Prosecutorial Remedies and Tools Against the

Exploitation of Children Today Act of 2003 (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650,[3] on the standard that the courts of appeals use to review downward departure decisions by district judges in sentencing, as well as the availability of a downward departure for a record of good works under U.S.S.G. § 5H1.11. Thurston's appeal invites, *inter alia,* clarification of the defense doctrine concerning a defendant's reasonable interpretation of the law; the issue of when a statute of limitations defense must be raised; the ramifications of a trial judge's failure to respond to jury instructions proposed by counsel; the evidence needed to show an intended loss; and the question whether fines are mandatory.

In the end we sustain the conviction but find that the sentence was in error.

I. FACTS

We state the facts as the jury could reasonably have found them, including a fair description of the defense evidence.

A. Background

Medicare provides certain medical services and care, including clinical laboratory testing services, to persons aged sixty-five and older and to persons with disabilities. At the time of the conspiracy, Medicare was administered

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[3] This Act is also known as the Amber Alert bill. It includes changes put forward in the so-called Feeney Amendment, which appears as § 401 of the Act.

by the Health Care Financing Administration (HCFA), a division of the U.S. Department of Health and Human Services. HCFA in turn contracted with private insurance companies ("carriers" and "intermediaries") to handle claims for reimbursement to Medicare program beneficiaries. By law, Medicare only reimburses clinical laboratory services if those services were medically necessary for the treatment or diagnosis of a beneficiary's illness or injury. 42 U.S.C. § 1395y(a)(1)(A) (2000); *see also* 42 C.F.R. § 424.10(a) (1988). Medicare did not generally reimburse screening tests. Medicare reimbursed one-hundred percent of the cost of necessary clinical blood tests.

Damon was, at the time, a Massachusetts corporation that provided clinical laboratory testing services to physicians, hospitals, health maintenance organizations, and their patients nationwide. Approximately thirty percent of Damon's revenues were from Medicare. Damon owned and operated a national system of clinical laboratories, and Damon was an approved Medicare provider. When Damon billed the Medicare program, it submitted to the carriers a HCFA 1500 form saying that it certified the lab tests were medically necessary. Physicians did not see those bills.

Thurston served as Regional Vice President of Damon from 1987 to 1990, and was responsible during all or part of this time for Damon's regional laboratories in Newbury Park, California; Phoenix; Chicago; and San Francisco. His office was at the Newbury Park lab; he traveled to the other labs and was in regular phone contact. Thurston was promoted to Senior Vice President of Operations in 1990. Thereafter, he relocated to the company headquarters in Needham, Massachusetts and supervised only the San Francisco lab. Another company purchased Damon in

August 1993; Thurston later switched employers and moved to Utah.

B. Theories of Prosecution and Defense

The government's theory was that the defendants tricked doctors into ordering medically unnecessary tests, for which Medicare paid. Damon added little-used tests to more popular panels of tests; it then tricked doctors by concealing that the panels could be ordered without the added tests and that Medicare was being charged for the tests. To conceal from doctors that Medicare was being charged, and to encourage doctors to order ferritin tests regardless of medical necessity, the defendants charged doctors and patients little or no extra fee for the added tests; provided literature saying that ferritin was provided free; otherwise failed to disclose to doctors the cost to Medicare of the expanded LabScan; and made it difficult to order the bundled test without ferritin.

The defense theories were that there was no conspiracy and, if there were, that Thurston was not a knowing participant. The defense contended that Damon complied with existing Medicare regulations, which neither prohibited bundling nor imposed a requirement on the lab to disregard a physician's certification that tests were medically necessary. It further argued that even if Thurston's interpretation of the regulations was incorrect, it was objectively reasonable, and so Thurston lacked the required criminal intent. Thurston's defense was also that any fraud was carried out by his subordinates, without his knowledge. He testified that he did not instruct the labs to add ferritin; did not authorize or condone any decision to forego a fee increase for doctors or private-pay patients on

the expanded LabScan; did not instruct subordinates to conceal that doctors could order a LabScan without ferritin; and had nothing to do with requisition forms or particular pieces of marketing literature.

C. Evidence of Conspiracy to Defraud

1. Addition of Ferritin

In late 1987, HCFA announced that effective April 1, 1988, Medicare would reduce by almost sixteen percent the fees paid to laboratories, including Damon, for providing clinical laboratory services to beneficiaries. If Damon maintained its existing practices and fee structure, then Damon would lose $800,000 in revenues during the first year alone, as Thurston knew. Of that amount, more than $500,000 of the annual losses would occur at Thurston's four regional laboratories.

There were corporate discussions, which included Thurston, about how to offset this loss. As a result, Damon added its ferritin test to the LabScan, a panel of more than a dozen blood chemistry tests performed by a single machine on one blood sample. The ferritin test was performed on separate equipment. Damon bundled ferritin with the LabScan from 1988 to at least mid 1993. The LabScan had been requested on at least thirty-five to forty percent of the orders submitted to Thurston's regional laboratories. By contrast, doctors rarely ordered the ferritin test. The general manager of one of the laboratories Thurston oversaw estimated that only one to two percent of the orders for blood tests included a request for a ferritin test.

Nothing in the medical literature at the time showed ferritin was necessary for all persons receiving LabScans.

Indeed, it was not. A family practitioner testified that he needed ferritin less than ten percent of the time it was included as part of the LabScan. Similarly, an internist testified that he needed the ferritin test for very few of his Medicare patients.

The plan to add ferritin to the LabScan was discussed at a general managers meeting in January 1988 and at a mid-year financial meeting for the western region in March 1988. Thurston attended both meetings. In late March, Thurston personally approved the addition of ferritin to the LabScans offered by the Newbury Park, San Francisco, and Phoenix labs.[4] Thurston initially acquiesced when the Phoenix lab sought permission not to add ferritin; in August 1988, however, after Thurston saw the financial results from the addition of ferritin at his other labs, Thurston ordered the Phoenix lab to add the test to the LabScan.

Thurston presented evidence that the decision to add ferritin was made at a lower level for legitimate reasons. Thurston and Isola testified that at the general managers meeting in early 1988, management decided to allow individual laboratories to determine whether to add ferritin to the LabScan. There was also testimony that Damon's sales force made requests to the sales managers

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[4] There was abundant evidence that Thurston instructed his subordinates to add ferritin. For example, the general manager of the Chicago lab had contemporaneous notes of a conversation with Thurston in 1988 indicating that Thurston told him to add ferritin to the LabScan. The manager of the San Francisco lab also testified that Thurston called him and told him to add the ferritin test to the LabScan.

and general managers of individual labs to add ferritin to the LabScan, on the grounds that the new test would make the panel more competitive.

2. Differential Charging for Ferritin Test

(a) Thurston's Knowledge of Price Differential

Medicare provided one reimbursement for the ferritin test and a separate reimbursement for the LabScan panel. In 1988, for example, Medicare paid $24.05 for a LabScan and $20.86 for a ferritin test.

Thurston's labs submitted to him capital expenditure requests (CERs) to help with the decision whether to bundle the tests. CERs were financial projections comparing the additional revenues (from Medicare reimbursements) and costs (partly from the purchase of new equipment) that would result from the addition of ferritin to the LabScan.[5] These CERs assumed there would be no increase in the charge to doctors and patients for a LabScan with ferritin. Thurston discussed and then signed the CERs. They projected losses of revenue from doctors and patients (who would receive free ferritin tests) and massive increases in revenue from Medicare reimbursements. One lab, for example, projected that the number of ferritin tests performed for Medicare beneficiaries would grow from 25 per month to 1,946 per month – increasing revenues by $10,308 per month. Overall, Thurston's labs

[5] The defense argues that the CERs were prepared for the related purpose of justifying, to Damon executives, the purchase of equipment to carry out a higher volume of ferritin tests.

projected that they would increase their Medicare reimbursements by approximately $1.16 million per year by adding ferritin to the LabScan; if multiplied by five years, this increase would be $5.8 million. The capital expenditure requests were best-case projections, assuming that every doctor who would otherwise have ordered a LabScan without ferritin would now order a LabScan with ferritin.

Damon sought reimbursement (at different rates) for ferritin tests from Medicare, CHAMPUS,[6] and other insurers, but provided them for free to doctors and patients. Thurston said he was unaware doctors were not being charged. But Thurston approved the decision by a number of his labs to adopt this policy of differential pricing depending on the client, and the CERs assumed no price increase for doctors and patients. Thurston instructed a subordinate to add ferritin at no charge to doctors; Thurston was present at a meeting in which another executive announced the no-charge policy; and Thurston received a memo saying that there was no price increase for doctors at a lab he oversaw. Witnesses testified that physicians are highly price-sensitive about charges for lab work and might object to the automatic inclusion of ferritin unless the test were provided for free. At least initially, many or all of Thurston's labs increased the charge to private insurance companies for a LabScan based on the addition of ferritin. However, any price

[6] CHAMPUS is the Civilian Health and Medical Program of the Uniformed Services, a health benefit and insurance program for dependants of military personnel that is administered by the Department of Defense.

increase for private insurers on the expanded LabScan was much smaller than the cost increase to Medicare.

Thurston presented evidence that two of his labs did increase the price for physicians; that this price increase provoked complaints by doctors; that he was informed of these complaints; and that he responded that doctors could not obtain a LabScan with ferritin unless they paid the higher price. He also presented evidence that the no-charge approach was a deviation from corporate policy and was initiated by the heads of individual labs; that he did not find out about any price differential until years after it had been implemented; and that he sought to correct any price differential as soon as he discovered it. Thurston testified that he did not authorize, condone, or ratify a decision not to increase the price of the LabScan based on the addition of ferritin.

(b) Concealing Price Differential from Doctors

Thurston's labs took steps to conceal from doctors that, in addition to the LabScan charge, Medicare would pay an extra fee for the ferritin tests. No letters were sent to doctors advising them that Medicare would be charged separately for the ferritin test. To the contrary, in April and May 1988, letters were sent to physicians notifying them that the ferritin test was going to be automatically added at "no extra cost." In Newbury Park, stickers were also printed and added to physicians' brochures and directories saying, "Ferritin Automatically Included at No Charge." Of course, as to Medicare patients, these statements were untrue.

Thurston testified that he did not pre-approve the letters or stickers saying ferritin would be provided free to customers. Thurston portrayed himself as a hands-off manager who trusted subordinates to build in a charge to physicians and to accurately promote the expanded LabScan.

Several physicians testified they were initially unaware that Damon charged Medicare for the ferritin component of the expanded LabScan. A number of Damon customers protested, and even switched labs, when they belatedly discovered Damon was charging Medicare for ferritin tests conducted as part of the LabScan. When doctors told Damon sales representatives that they did not need the additional test, some were told that a LabScan without ferritin would cost more than a LabScan with ferritin. A major client referred Damon to a newspaper article criticizing the practice of bundling tests into panels and profiles, and warned Damon that its failure to educate doctors about the composition of and alternatives to its panels would subject it to ongoing criticism. Thurston was informed of these complaints, which were written up in monthly management reports he received in 1989 and 1990. Despite these complaints, Thurston did not cause a letter to be sent to doctors informing them of the extra charge for ferritin to Medicare.

Damon also collaborated with HMOs operating on a capitation basis (i.e., paying a flat monthly fee for each HMO member) to reduce utilization of bundled tests such as the LabScan. For example, one of Thurston's labs added to its HMO requisition form a checkbox for a LabScan without ferritin. Damon made no such effort to assist Medicare.

3. Availability of LabScan Without Ferritin

Thurston instructed subordinates to take specific steps that hid the fact that the LabScan could be ordered without ferritin and made it difficult for doctors to order the LabScan separately. For example, Thurston told the general manager of the Newbury Park lab not to advertise or promote the fact that doctors could still order a LabScan without ferritin. Similarly, Thurston helped make the decision to omit, from the Newbury Park letter announcing to doctors the addition of ferritin to the LabScan, the test code for ordering a LabScan without ferritin. The standard requisition forms used by Thurston's labs did not change following the addition of ferritin to the LabScan; there was a checkbox for the "LabScan" (which now included ferritin) but no box for the "LabScan without ferritin" or the "LabScan with ferritin."

During the conspiracy period, there were at least two ways for doctors to order the LabScan without ferritin. They could handwrite such an order on a standard requisition form, or they could request and obtain a customized requisition form with a checkbox for the LabScan without ferritin. A number of doctors and institutions took advantage of these options.

Thurston testified that he did not tell anyone to conceal or refrain from advertising that the LabScan could be ordered without ferritin. There was testimony that, after Thurston learned in 1991 that the front of a requisition form used by one of his labs did not disclose the inclusion of ferritin in the LabScan, he instructed a subordinate to list it on the front and the form was so amended.

4. Apolipoprotein

Damon also added an apolipoprotein test to its coronary risk panel in 1989. Before apolipoprotein was added to the panel, clients ordered it very rarely. The standard requisition forms Damon used after adding apolipoprotein to the panel also did not offer a checkbox for a coronary risk panel without apolipoprotein. Following the addition of apolipoprotein, the cost to doctors of the coronary risk panel increased by five dollars. Medicare reimbursed apolipoprotein separately at a rate well above five dollars. Thurston participated in the decisions about the addition, the requisition forms for, and the extra charges for apolipoprotein.

D. Thurston's "Reasonable Interpretation" as Evidence of Lack of Criminal Intent

Thurston presented evidence that from 1988 to 1993 it was an industry-wide practice for labs to rely on the doctors who ordered tests to make determinations of medical necessity. Because, prior to 1994, doctors did not normally share their diagnoses with labs, labs did not have the information required to gauge medical necessity. Damon employees did not believe that they certified tests as medically necessary when they submitted HCFA 1500 forms with Medicare bills. Instead, they believed it was the doctors who ordered LabScans who made the certification.

Two expert witnesses testified that it was appropriate in 1988 to include ferritin in a blood chemistry panel. The bundling of different tests into panels was lawful under Medicare regulations. There was testimony that technological changes during the 1980s made it possible to

automate the ferritin test, which presumably made it much cheaper to conduct. Witnesses for both sides testified that by 1988 some of Damon's competitors offered ferritin as part of their blood chemistry panel and so Damon added the test to stay competitive.

II. PROCEDURAL HISTORY

A. Indictment and Trial

On January 22, 1998, a thirty-nine paragraph single-count indictment charged Thurston and three other former Damon executives – Joseph Isola, Beno Kon, and Gerald Cullen – with conspiring to defraud HCFA in violation of 18 U.S.C. § 371[7] by causing doctors to order unnecessary tests by adding a test for ferritin to a pre-existing panel of diagnostic blood tests, and by adding a test for apolipoproteins to a profile used to assess coronary artery disease. The conspiracy period was from July 1987 to August 1993.

Isola, President of Damon, pled no contest and, pursuant to his plea agreement, was sentenced to three years' probation and a one-hundred dollar special assessment. Kon, Corporate Controller, died during the proceedings. Cullen, Senior Vice President for Operations, was tried before the district court in October 2001 and acquitted at the close of the government's evidence. In addition, Damon pled guilty on October 11, 1996 to conspiracy to defraud by bundling ferritin with the LabScan and apolipoprotein with the cardiac risk panel. The company was

[7] Damon was separately indicted for conspiracy to defraud HCFA, on the basis of the same events.

sentenced to pay a $35,273,141 fine, and later entered into a civil settlement under which it paid the United States and the state Medicaid programs an additional $83,756,904.

Thurston was tried before a jury in November and December 2001. The trial lasted three weeks. At the close of the government's evidence, the district court granted Thurston's motion for judgment of acquittal as to the indictment's apolipoprotein allegations, ordered these allegations stricken, and explained to the jury that only the ferritin allegations remained. The jury found Thurston guilty. Thurston's subsequent motions for judgment of acquittal and for a new trial were denied. The procedural rulings at trial that Thurston attacks are described below.

B. Sentencing

The district court sentenced Thurston to three months' imprisonment (with a judicial recommendation that the term be served in a halfway house), followed by twenty-four months of supervised release (of which the first three months were to be served in home detention). The court imposed a one-hundred dollar special assessment and no fine. The Pre-Sentence Report (PSR) had recommended a Total Offense Level of twenty-six and a Criminal History Category of one. The PSR identified the base offense level as six. It recommended a fourteen-level upward enhancement for an intended loss of at least five million dollars; a two-level enhancement for more than minimal planning; and a four-level enhancement for a leadership role. It also suggested that an enhancement for obstruction of justice was appropriate, on the grounds that

Thurston perjured himself at his trial. The PSR recommended the statutory maximum term of sixty months' imprisonment and noted that both the statute and the guideline allowed for a fine. It calculated that Thurston had a net worth of $1,526,904.

The defense contested the PSR's recommendations. Thurston requested a three-level decrease because the substantive offense of defrauding the United States was incomplete; a four-level decrease because Thurston was a minimal participant; and a two-level decrease for acceptance of responsibility. Thurston requested a downward departure on the grounds that he had an extraordinary record of charitable work and community service; that the offense constituted aberrant behavior; and that there was the potential for a large disparity with Isola's sentence.

The government argued that Thurston should receive a two-level upward enhancement for obstruction of justice. Otherwise, it accepted the recommendations of the PSR. The parties agreed that any restitution had been made by Damon, the corporate defendant.

The district court sentenced Thurston at a hearing on June 26, 2002 to three months' imprisonment, a period of supervised release, and no fine. The district court granted a fourteen-level enhancement for the size of the intended loss, *see* U.S.S.G. § 2F1.1(b)(0) (1992 version),[8] a four-level

[8] U.S.S.G. § 2F1.1 was deleted by consolidation with U.S.S.G. § 2B1.1 effective November 1, 2001. *See United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77 n.3 (1st Cir. 2002). Under the current guidelines, a loss exceeding $2.5 million warrants an *eighteen*-level upward enhancement. U.S.S.G. § 2B1.1(b)(1). When the guidelines in effect at the time of sentencing are more stringent than those in effect at the

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enhancement for an aggravated role in the offense, *see* U.S.S.G. § 3B1.1(a) (1992 version), and a two-level enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2) (1992 version). The court did not explicitly rule on the government's request for an obstruction of justice enhancement, *see* U.S.S.G. § 3C1.1 (1992 version), or Thurston's request for a three-level decrease for failure to show completion of the substantive offense, *see* § 2X1.1 (1992 version). Thurston's adjusted offense level of twenty-six and criminal history category of one yielded a guidelines sentencing range of sixty-three to seventy-eight months' imprisonment; this range was trumped by the statutory maximum of sixty months for a violation of 18 U.S.C. § 371.

During the hearing, the government confirmed that Thurston had been offered (and had rejected) a plea agreement "along the lines" of the one that Isola had accepted. Over the government's objections and arguments, the district court then departed downward on the basis of Thurston's record of charitable work and community service and the disparity between Thurston's and Isola's sentences. The court then solicited the government's recommendation about the extent of the departure. The government responded that, if the court chose to depart, then it should depart no further than the sentencing guidelines for a perjury conviction, which would be an offense level of twenty (six less than that of the underlying

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time of the offense, the latter are normally used, partly to avoid any hint of an ex post facto increase in penalty. *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (citing *United States v. Harotunian*, 920 F.2d 1040, 1041-42 (1st Cir. 1990)).

offense), for a sentencing range of thirty-three to forty-one months' imprisonment. The court then departed by at least sixteen levels.

The government appealed the sentence and Thurston appealed his conviction and sentence.

III. THURSTON'S APPEAL FROM HIS CONVICTION

Thurston was convicted under 18 U.S.C. § 371, which provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

A. Statute of Limitations

Thurston argues that the trial court erred in not granting his post-verdict Rule 29 motion for acquittal, because the government had not proved an overt act during the limitations period, and in not sua sponte instructing the jury on the statute of limitations.

The statute of limitations for 18 U.S.C. § 371 crimes is the general five-year statute of limitations contained in 18 U.S.C. § 3282. Here, that five years ran back from January 22, 1998, the date of the indictment, less the six weeks during which Thurston agreed to toll the limitations period. The government, therefore, had to prove an overt

act was done on or after December 11, 1992. The indictment properly alleged at least eight overt acts within the limitations period.

Thurston did not raise the defense of statute of limitations either before or at trial, did not request an instruction on the defense, and did not object when the judge instructed without addressing the issue. Thurston first raised the issue by Rule 29 motion after the verdict. The government says Thurston raised the issue too late. There is a preliminary question of when such a motion should be raised, a question affecting our standard of review.

"The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . ." *Biddinger v. Comm'r of Police,* 245 U.S. 128, 135 (1917). Here the indictment adequately pled facts to establish that the crime was within the limitations period. Thurston was not required to raise the defense before trial under Rule 12(b)(3), Fed. R. Crim P. Nor would it have made sense for him to do so, since the defense depended on what the government proved or failed to prove at trial. In a criminal case a defendant need only plead as to the accusation of guilt in the indictment and need not raise the statute of limitations as an affirmative defense before trial.[9] Thurston mistakes these truisms for an argument that he need not raise the limitations defense at all before the jury delivers a verdict of guilt.

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[9] By contrast, in a civil case, a defense of statute of limitations must be raised in an answer or it is lost. Fed. R. Civ. P. 8(c); *In re Cumberland Farms, Inc.,* 284 F.3d 216, 225-27 (1st Cir. 2002).

The government says Thurston has waived[10] the issue and may not raise it at all. Absent an explicit agreement to waive the defense, we treat the issue as a forfeiture and not a waiver, contrary to the government's argument. This was not an intentional relinquishment or abandonment of a known right, the definition of a waiver. The issue of failure to assert the defense was viewed as forfeiture in *United States v. O'Bryant,* 998 F.2d 21, 23 n.1 (1st Cir. 1993). The rule we use – that the defense of statute of limitations must be raised at trial and, if not, is forfeited but not waived – is the rule in most circuits. *See United States v. Ross,* 77 F.3d 1525, 1536 (7th Cir. 1996) ("[I]t is widely accepted that a statute of limitations defense is forfeited if not raised at the trial itself.") (citing cases).

Thurston has indeed forfeited[11] the defense that the government did not prove facts that an overt act occurred within the limitations period. The defense should have been raised at trial. Waiting until after the jury has rendered a verdict of guilt to raise a limitations defense for the first time is inconsistent with the characterization of

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[10] A defendant may waive the defense of statute of limitations by several means, including by entry of plea of guilty, *see Acevedo-Ramos v. United States,* 961 F.2d 305, 308 (1st Cir. 1992), or by a voluntary agreement, usually written, such as in a tolling agreement, *see United States v. Spector,* 55 F.3d 22, 24 (1st Cir. 1995). None of those situations is present here.

[11] Our reasoning that the argument has been forfeited would be different if compliance with the limitations period were either jurisdictional or an element of the offense that the government had the burden of proving. Here, when the limitations defense is not an issue of law but is based on facts to be proven, the defense must be raised at trial at the latest.

the statute of limitations as an affirmative defense and would unfairly sandbag the government.

Because this was a forfeiture and not a waiver, there is still plain error review available under Fed. R. Crim. P. 52. *See United States v. Olano,* 507 U.S. 725, 731-32 (1993). Our conclusion is straightforward. The government's evidence established overt acts by the conspirators within the limitations period, so there was no error at all as to the statute of limitations, much less plain error.

The government showed that labs overseen by Thurston (and his co-conspirators) submitted tens of thousands of reimbursement claims to Medicare after December 11, 1992 for ferritin tests conducted as part of LabScan orders. The government also presented ample evidence that many of these tests were medically unnecessary and were submitted by doctors unaware that Medicare would be charged separately for ferritin.[12] It was not credible that the ferritin test, ordered less than two percent of the time, suddenly became medically necessary thirty to forty percent of the time within the life span of the conspiracy.

Thurston also argues he was entitled to a jury instruction on the limitations point. By failing to request a jury

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[12] For example, government witness Dr. Johnson testified that he ordered the LabScan regularly for Medicare patients; rarely needed a ferritin test; and, when he discovered that Damon charged Medicare separately for ferritin, demanded that ferritin be removed from panels he ordered. As demonstrated by a lab report the defense introduced into evidence, Dr. Johnson continued ordering the LabScan with ferritin for Medicare patients through mid-1993.

instruction and failing to object to the lack of an instruction, he has forfeited the argument. Fed. R. Crim. P. 30; *see United States v. Gallant,* 306 F.3d 1181, 1187 (1st Cir. 2002) ("[A] party unhappy with a trial court's jury instruction [must] promptly state the precise objection after the instruction has been given."). As there was no error, the plain error standard was not met. *See* Fed. R. Crim. P. 30, 52(b).

B. Purported Lack of Criminal Intent and the Requested Reasonable Interpretation Instruction

Procedurally, the issue of reasonable interpretation comes up in two ways: denial of Thurston's Rule 29 motions and denial of his request for a jury instruction. Thurston's three Rule 29 motions – at the end of the government's case, at the end of the defense case, and after the verdict – all argued that he lacked the needed criminal intent. Our review is of whether a rational fact finder could conclude, beyond a reasonable doubt, that the government proved the elements of the crime, including intent. *United States v. Moran,* 312 F.3d 480, 487 (1st Cir. 2002). Thurston also requested a jury instruction on reasonable interpretation of the law[13] and preserved his objection to the court's rejection of the instruction.

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[13] The instruction he requested stated in part:

> Mr. Thurston contends that an independent clinical laboratory does not violate any aspect of Medicare law in providing physicians with a profile or panel that contains a serum ferritin test, so long as the physician is given reliable

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Thurston argued he reasonably interpreted the law as requiring that the treating physician, not the test lab, certify to the HCFA that the test ordered was medically necessary and reasonable, and that he and the company were entitled to rely on that physician certification. Specifically, Thurston contended that in the relevant time period an independent clinical lab did not violate any aspect of Medicare law by: (1) providing physicians with a panel containing a ferritin test, so long as the physician was given reliable and accurate information about the test and could select the panel without the test; or (2) submitting a reimbursement claim, using a HCFA form or otherwise, so long as a physician ordered the test performed. This is one of his primary arguments on appeal.

Whether a particular defense doctrine is germane depends on the crime charged and the facts of the case. This is where Thurston's argument falters. He argues that

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and accurate information about the test and the choice to select the profile or panel with or without the added test.

Mr. Thurston also contends that an independent clinical laboratory does not violate any aspect of Medicare law in submitting a claim for reimbursement, using a HCFA form or otherwise, so long as the blood tests performed were ordered by a physician.

I instruct you as a matter of law that these are reasonable interpretations of the Medicare statutes, regulations and rules.

In order for you to find Mr. Thurston guilty on the basis that he caused physicians to order medically unnecessary tests for their patients, the government must prove beyond a reasonable doubt that these were not Mr. Thurston's interpretations of the pertinent Medicare laws.

he could not have had the needed intent because employees of clinical labs, including Thurston, "were unaware that they were actually certifying the medical necessity of each test performed for every patient" and they could reasonably interpret the law to mean that the treating physician, not the laboratory, made the certification. The argument is beside the point.[14]

Thurston was not charged with making a false statement to the United States, the falsity of which turned on an ambiguity in what the law required. Nor was he charged with failing to make a statement required by law in a situation of parallel ambiguity. He was not charged with falsely certifying the medical necessity of the tests ordered. He was charged with the crime of conspiracy to defraud the United States by inducing physicians through deceit and trickery into certifying tests as medically necessary when the ferritin tests were not necessary, thus leading Medicare to pay for unnecessary services.

Thurston's knowledge of the Medicare regulations and of the fact that the ordering physicians would certify the medical necessity of the tests was, ironically, part of the proof of the crime, not a defense. Thurston cannot, under 18 U.S.C. § 371, knowingly conspire to mislead and manipulate doctors into certifying medically unnecessary tests which led to improper payment of Medicare funds and then defend on the basis that he committed no fraud

[14] Thurston argues it would be nonsensical to ask clinical testing laboratories to guarantee that a test ordered by a doctor was in fact medically necessary. That question simply is not raised here.

because the doctors, not he, were the ones who certified the tests as necessary.

Thurston's reliance on *United States v. Prigmore,* 243 F.3d 1 (1st Cir. 2001), is misplaced. *Prigmore* is part of a line of cases charging false statements or failure to make required statements, holding that intent should be measured against an objectively reasonable understanding of the legal requirements to be met, and that a statement is not in fact false or fraudulent if it is based on an objectively reasonable interpretation of that legal requirement. *See id.* at 17-18. This court first applied this principle in *United States v. Rowe,* 144 F.3d 15, 21-23 (1st Cir. 1998), to a statement that was not in fact false under an objectively reasonable interpretation of a disclosure requirement. In *Prigmore,* the conspiracy charged was to defraud and impair the functioning of the Food and Drug Administration, in connection with its oversight and regulation of medical devices, through failure to file reports which were required under certain conditions. The fraud alleged was the failure to submit a pre-market approval information supplement to the FDA, but whether such a supplement was required depended on the interpretation of certain regulations. The same conditional requirement was true of certain testing reports. The question was whether defendants could objectively and reasonably understand one regulatory phrase, "affecting the safety or effectiveness of the device," as being circumscribed by another regulatory phrase, "intended . . . conditions of use." *See* 243 F.3d at 15.

No similar question was presented here. Here, the underlying crime was one of manipulating doctors into making false certifications so Damon could receive unwarranted Medicare payments. There is no material question

about ambiguity in the underlying legal requirements and no germane question about the meaning of the law. There was also no issue of lack of fair notice of what the law requires, a concern underlying the *Prigmore/Rowe* line of cases. A reasonable person knows it is wrong to trick others into doing something wrong that one does not do directly oneself, especially in order to obtain personal gain. The *Prigmore* doctrine has no application given the crimes charged and the facts involved. Because the nature of the crime charged made the reasonable interpretation doctrine irrelevant, the jury instruction issue disappears.

C. Failure of District Court to Respond To Requested Instructions

Thurston argues that the district court violated Rule 30, Fed. R. Crim. P., which provides:

> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.
>
> (b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

Thurston is correct: the district court failed to inform the parties of how it intended to rule on each of the requested instructions before closing arguments, as required by the rule.

A description of the interactions of court and counsel sets the stage. Each side submitted extensive requests for instructions, and there were disagreements.[15] The court did resolve the most serious disputes over some of the instructions (for instance, on the reasonable interpretation/*Prigmore* question) and told counsel these rulings before closing argument. The court did not, though, review all of the requests. Thurston's counsel did not object to this silence before giving his closing.

Defense counsel did raise an issue after closing, and before the jury was instructed, that he wanted to put on record his specific objections to the government's requests. He did not say he had been prejudiced in any way by the court's failure to rule on the requested instructions before he gave his closing. The court replied that it would neither rule on nor hear argument on the proposed instructions. Rather, the court stated its understanding that the appropriate time to object was at the end of the instructions. Nonetheless, it did hear argument on the government's Request No. 8 (the compelled witness rule), and declined to give the instruction. It also heard argument on the government's proposed instructions No. 18 (conspiracy);

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[15] As examples of disagreements, Thurston gives the following. The government filed objections to Thurston's requested instructions concerning character evidence and reputation (No. 7); Thurston's status as vice-president (No. 10); the definition of "knowingly" (No. 16); the definition of "willfully" (No. 17); proof of specific intent to participate (No. 18); the definition of "overt act" (No. 21); the good-faith defense (No. 22); and Thurston's reasonable interpretation of Medicare laws (No. 23). Counsel for Thurston objected to three of the government's requested instructions, each of which concerned an element of the offense: conspiracy (No. 18); unlawful objectives (No. 19); and overt acts (No. 22).

No. 19 (unlawful objectives); and No. 22 (overt act). The only proposed defense instruction called to the court's attention was No. 24, on missing witnesses.

The district court did not, as Rule 30 requires, tell counsel before closing argument its disposition of all of the requested instructions. But counsel for Thurston had an obligation to bring this to the court's attention before the closing and did not do so.

Without addressing the issue of whether Thurston has thus forfeited the Rule 30 argument, we choose to simply evaluate whether defense counsel's closing argument was adversely affected. *See United States v. Owens,* 167 F.3d 739, 753 (1st Cir. 1999). It was not. One telling indicium that there was no prejudice is that trial counsel did not ever say to the court he would be prejudiced if he had to proceed with his closing without knowing the court's disposition of the remaining requested instructions.

An even more telling indicium of lack of prejudice is that Thurston's appellate counsel has been unable to identify any specific areas of prejudice occasioned by the trial court's lapse. While in theory such a lapse could cause prejudice, the most that is argued here is that there was "no detailed reference to important legal concepts regarding criminal conspiracy and the state of mind by which Thurston would be judged." Appellate counsel does not identify those "important legal concepts," and we see none. As to Thurston's state of mind, the trial judge did instruct on the government's burden to show Thurston had a specific intent to participate in the conspiracy and to defraud the United States. The court instructed the jury to consider Thurston individually to determine if he willfully joined the conspiracy. The court,

in turn, defined "willfully." The court also explicitly rejected Thurston's reasonable interpretation instruction, and it instructed on good faith. These circumstances belie any claim of prejudice and Thurston's claim fails.

D. Motion for New Trial Based on Dismissal of Apolipoprotein Charge

Thurston and his co-defendants were originally charged with conspiracy to commit fraud as to both the ferritin and the apolipoprotein tests. At the close of the government's case the court granted Thurston's motion for judgment of acquittal on the apolipoprotein test, struck those references from the indictment, and instructed the jury that this issue was no longer before it. The government did not thereafter refer to this issue.

Thurston now argues that the court should have granted Thurston a new trial after the jury returned because the apolipoprotein evidence irretrievably tainted the trial. The government rejoins that counsel should have raised the issue sooner.

Again, we bypass the issue of forfeiture and reject the argument that dismissal of the apolipoprotein charges tainted the proceedings. Thurston's argument that none of this evidence would have been admitted if the ferritin charges were tried alone is based on an unlikely premise. Where the evidence admitted as to a dismissed count would have been admissible as to a remaining count, the defendant has not suffered prejudice. *United States v. Rooney,* 37 F.3d 847, 855-56 (2d Cir. 1994) (collecting cases); *see United States v. Weiner,* 3 F.3d 17, 22 (1st Cir. 1993) (jury properly considered evidence relating to counts

dismissed prior to verdict, since evidence was relevant to remaining counts).

The government would have introduced such evidence in any event as relevant to rebut central defense themes that, because Damon had such a decentralized decision-making structure, Thurston was not involved in key decisions. The apolipoprotein evidence contradicted Thurston's claims about the extent and consequences of Damon's decentralized approach to the make-up, pricing, and marketing of its panels.

There was little risk of prejudice for other reasons. The government did not mention the apolipoprotein evidence in its closing, and exhibits pertaining only to apolipoprotein were removed before the documents were submitted to the jury. Further, most of the testimony and documentary evidence in the first half of the case, before the court ruled on the Rule 29 motion, dealt with ferritin. These factors further minimized the likelihood of any taint.

Thurston's conviction is affirmed.

IV. SENTENCING APPEALS

A. Thurston's Appeal: Loss Calculation

Much of Thurston's guidelines sentence range (sixty-three to seventy-eight months) was driven by the loss calculation. Both the PSR and the government recommended an intended loss figure of more than five million dollars but less than ten million dollars. This resulted in a fourteen-level increase in the base offense level.

Thurston, not surprisingly, targets this loss calculation. He makes two arguments. The first is that the government was precluded by a comment to U.S.S.G. § 2F1.1 from ever relying on intended loss unless the government first established what the actual loss was and then established that the intended loss was greater. This is a pure issue of guidelines interpretation, which we review de novo. *See United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77 (1st Cir. 2002). The second argument is that the court's conclusion had insufficient factual support for a number of reasons, a contention reviewed for clear error.

The guidelines interpretation argument turns on a comment that provides:

> Consistent with the provisions of § 2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.

U.S.S.G. § 2F1.1, cmt. n.7 (Fraud and Deceit) (1992 version).

Thurston argues that because the government did not show actual loss, it cannot turn to intended loss. The argument is simply wrong as a matter of the wording of the comment. The comment directs the use of an intended loss figure when it is greater than the actual loss figure; the comment does not restrict the sentencing court's ability to rely on intended loss when there is no actual loss calculation available. Defendant's reading also makes little sense: it may be easier as a matter of proof to show intended loss than actual loss. Conspirators are held accountable for the loss they intend to commit. Finally, it is obvious on these facts that the intended loss was greater

than the actual loss – some doctors quit using Damon when, to their disgust, they realized what the scheme was.

Thurston next mounts a series of fact-based attacks on the intended loss figure of more than five million dollars. That figure is supported by the capital expenditure requests each of the labs prepared to obtain funding to buy the equipment needed to perform the increased ferritin testing the labs anticipated. Each CER included a financial analysis, one component of which was the estimated new revenue from bundling the tests. Thus, the intended loss calculation was based on the conspirators' own financial calculations.

Thurston argues the CERs, being mere financial projections, are not an adequate basis for an intended loss figure; that the CERs were based on an assumed best-case scenario in which no physician who ordered Labscans would decline to get ferritin tests; that, in any event, not all physicians who ordered the bundled test were tricked into doing so; that the conspiracy was not proven to last five years; that the conspiracy ended before five years had elapsed for several labs, given the different dates on which the labs bundled the tests; and that later, only one lab reported to Thurston.

A number of these are quickly dispatched. The jury verdict of guilt disposes of the question of the length of the conspiracy. Thurston's promotion out of management of three of the labs is irrelevant since he earlier conspired to produce losses intended to go on for years.

Thurston also argues that the intended loss had to be reduced under U.S.S.G. § 2X1.1(b)(2) because the government's proof did not establish that the conspirators had "completed all the acts the conspirators believed necessary

on their part for the successful completion of the substantive offense." *Id.* There is no merit to the argument. There was successful completion of the offense: the tests were bundled and doctors were misled into ordering unnecessary ferritin tests. The complaints from customers about Damon's practices were confirmation the scheme had worked.

The closer question is the degree of precision the government must reach in showing intended loss. It is true that the CERs set forth best-case scenarios which assumed all doctors would order the bundled test without culling out the ferritin test. If the CERs stood alone, defendant would have a better argument. But they are supplemented by the fact that Damon made it extremely difficult for doctors to cull out the ferritin and order the Labscan without a ferritin test.

Further, the conspirators tried to hide from doctors the fact that there was a significant cost to Medicare associated with the bundling. The conspirators were maximizing the probability that all doctors would accept the bundling, without culling and without protest. The fact that the conspirators were not entirely successful in fooling all doctors does not lessen their intent.

We have noted before that intended loss does not have to be determined with precision; the court needs only to make a reasonable estimate in light of the available information. *United States v. Blastos,* 258 F.3d 25, 30 (1st Cir. 2001). There was good evidence of intent and some "prospect of success" for the fraud to reap over five million dollars, and that is all that the case law requires. *United States v. Orlando-Figueroa,* 229 F.3d 33, 48 (1st Cir. 2000). The best-case CER projection was a loss to Medicare over

the charged five-year life of the conspiracy of $5,800,230. It was reasonable for the district court to estimate that the intended loss exceeded five million dollars, even allowing for the one to two percent normal order rate for ferritin tests. The government met its burden and Thurston offered little in rebuttal except his protestations of innocence. There was no clear error.

B. Government's Appeal

Given an intended loss of five million dollars, Thurston's crime led to the statutory maximum sentence of five years. The district court departed downward from the Guidelines range by sixteen levels, however, sentencing Thurston to three months' imprisonment to be followed by twenty-four months of supervised release. The court imposed no fine and recommended that the term of imprisonment be served in a halfway house.

1. Standard of Review: The PROTECT Act

On April 30, 2003, section 401 of the PROTECT Act became effective. That section changes the applicable standard of review for certain issues in appeals from departures from the sentencing guidelines. Section 401 amends 18 U.S.C. § 3742(e), which now provides:

> (e) *Consideration.* – Upon review of the record, the court of appeals shall determine whether the sentence –
>
> . . . .
>
> (3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c);

. . . .

. . . .

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, *except with respect to determinations under subsection (3)(A) or (3)(B),* shall give due deference to the district court's application of the guidelines to the facts. *With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.*

(emphasis added).

This changed the law. Under *Koon v. United States,* 518 U.S. 81 (1996), the courts of appeals were not to review a departure decision de novo, but were to ask whether the sentencing court abused its discretion in granting the departure. *Id.* at 91, 96-100. In appeals from sentencing departures, we had, before the PROTECT Act, engaged in a three-part review: "(1) we determine[d] whether the stated ground for departure [was] theoretically permissible under the guidelines; (2) if so, we examine[d] the record to assess whether there [was] adequate factual support; and (3) we determine[d] the appropriateness of the degree of departure." *United States v. Bogdan,* 302 F.3d 12, 16 (1st Cir. 2002). Whether the stated ground for departure was theoretically permissible – the first part – was a question of law reviewed de novo. *United States v. Bradstreet,* 207 F.3d 76, 81 (1st Cir. 2000); *see also United States v. Diaz,* 285 F.3d 92, 97-98 (1st Cir. 2002). Under *Koon,* our review under the remaining two parts was for abuse of discretion only. *See Koon,* 518 U.S. at 96-100; *United States v. Lujan,* 324 F.3d 27, 31 n.5 (1st Cir. 2003); *United States v. Martin,* 221 F.3d 52, 55 (1st Cir. 2000).

After the PROTECT Act, the statute requires de novo review not merely of the ultimate decision to depart, but also of "the district court's application of the guidelines to the facts." § 3742(e). If this court agrees that the decision to depart was justified under the guidelines, however, the *extent* of the departure granted by the district court is reviewed deferentially, just as it was prior to the PROTECT Act. *Id.; United States v. Frazier,* 340 F.3d 5, 14 n.4 (1st Cir. 2003); *see also United States v. Mallon,* 345 F.3d 943, 946 (7th Cir. 2003); *United States v. Jones,* 332 F.3d 1294, 1300 (10th Cir. 2003).

(a) Retroactivity

Thurston argues that the PROTECT Act should not be interpreted to apply to this case and that, if it does apply, it is retroactive and invalid. He makes two statutory intent arguments: (1) that the internal structure of the statute means it should not be applied to cases already pending on appeal; and (2) that the presumption against retroactivity should apply.

First, Thurston argues that Congress meant application of the de novo review provisions in the PROTECT Act to be deferred until appeals arise from sentences entered after the Act became effective. This is evident, Thurston says, since the Act imposed a new requirement for the district judge to give a *written* statement of reasons. From this, Thurston argues, all provisions of the Act were meant to apply only to post-Act sentencing. The argument is plausible, but we are unpersuaded. Even before the PROTECT Act, a trial court was required to give some reasons, though not necessarily in writing, for a downward departure. *See* 18 U.S.C. § 3553(c) (pre-PROTECT Act version); *United States v. Sclamo,* 997 F.2d 970, 973 (1st Cir. 1993) (discussing discouraged ground for departure); *United States v. DeMasi,* 40 F.3d 1306, 1324 (1st Cir. 1994) (same). A requirement that this statement of reasons be written, rather than oral, has no particular connection to the appellate standard of review.

Although the Act does not expressly say that its de novo review provision applies to pending appeals, it does give an effective date of April 30, 2003. The effective date of a statute does not by itself establish that it has any application to conduct that occurred at an earlier date. *See INS v. St. Cyr,* 533 U.S. 289, 317 (2001) (quoting *Landgraf*

v. USI Film Prods., 511 U.S. 244, 257 (1994)). Still, we agree with the Eighth Circuit that the new statute applies to appeals pending as of the effective date of the statute. *See United States v. Aguilar-Lopez*, 329 F.3d 960, 962-63 (8th Cir. 2003). Subject to constitutionally based retroactivity concerns, it is certainly within Congress's power to change a standard of review. *See, e.g., Hines v. Sec'y of Dep't of Health & Human Servs.*, 940 F.2d 1518, 1523 (Fed. Cir. 1991); *Consumers Union of U.S. v. FTC*, 801 F.2d 417 (D.C. Cir. 1986); *cf. Bierce v. Waterhouse*, 219 U.S. 320, 336-37 (1911). Much of the conduct regulated by this part of the PROTECT Act is that of the courts of appeals (and indirectly, the district courts now under closer scrutiny), and that involves conduct dating from April 30, 2003 forward.

Thurston's fall-back argument is that applying a changed standard of review to a case already on appeal would have an impermissible effect on him under the Supreme Court's retroactivity jurisprudence. *See Landgraf*, 511 U.S. at 264. Not so. The change of a standard of appellate review is one in procedure for the courts; procedural changes that do not affect substantial rights are not usually considered impermissibly retroactive. This legislation is little different than the Supreme Court's changing the standard of review by directing the courts of appeals to decide ultimate Fourth Amendment questions de novo. *Cf. Ornelas v. United States*, 517 U.S. 690, 697 (1996). The PROTECT Act's alteration of the appellate standard of review upsets no legitimate reliance interest by a defendant; it could not have induced alteration of the behavior

that led to the crime.[16] We see no unfairness to defendants in Congress's requiring a closer look by appellate courts at whether a district court committed an error in deciding that the guidelines permitted a departure. It is the substance of the sentencing rules, both in the Guidelines and in the underlying statutes, that affects defendants.[17]

(b) Separation of Powers

Thurston makes a cursory argument that the PROTECT Act presents serious constitutional separation-of-powers questions. At the request of the Senate, the Chief Justice, expressing the views of the U.S. Judicial Conference, did advise the Senate of the Conference's opposition to portions of the bill, including alteration of the standard of review. *See* Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy (undated), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Rehnquist_letter.pdf. The

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[16] In Thurston's case, there could be no reliance interest in any event, since this court used a de novo standard of review at the time he committed the crime. Before *Koon* was decided in 1996, the rule in this circuit was that we would review de novo whether "taking the reasons for departure stated by the district court at face value, those reasons will as a matter of law justify abandonment of the guidelines." *United States v. Wogan*, 938 F.2d 1446, 1447 (1st Cir. 1991).

[17] Since the original panel opinion issued in this case, every other circuit to address the question has similarly held that the PROTECT Act does not have an impermissibly retroactive effect when applied to cases pending as of the Act's effective date. *See United States v. Stockton*, 349 F.3d 755, 764 n.4 (4th Cir. 2003); *United States v. Bell*, 351 F.3d 672, 674-75 (5th Cir. 2003); *United States v. Mallon*, 345 F.3d 943, 946-47 (7th Cir. 2003); *United States v. Willey*, 350 F.3d 736, 738-39 (8th Cir. 2003).

U.S. Sentencing Commission requested that Congress not act until the Commission had the opportunity to analyze data and study the matter. *See* Letter from Judge Diana Murphy, Chair of the U.S. Sentencing Commission, et al., to Senators Orrin Hatch and Patrick Leahy (April 2, 2003), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/stcg_comm_current.pdf. But judicial opposition to legislation on policy grounds is one thing; unconstitutionality is quite another. No real theory of unconstitutionality has been presented by this appeal, and so the issue is waived. See *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990).

(c) Scope of De Novo Review

A different argument was advanced in the petition for rehearing concerning the scope of de novo review under the PROTECT Act.[18] The final sentence of § 3742(e) requires the court of appeals to review de novo all determinations by the district court "under subsection (3)(A) or (3)(B)," the texts of which are set forth above. In his petition for rehearing, Thurston, ably assisted by amicus, argues that subparagraphs (3)(B)(i) and (3)(B)(ii) apply only in cases involving "unmentioned" departures, *i.e.,* departures on grounds not expressly considered by the

[18] Ordinarily, this court does not consider arguments raised for the first time in a petition for rehearing. *United States v. Bongiorno,* 110 F.3d 132, 133 (1st Cir. 1997); *Am. Policyholders Ins. Co. v. Nyacol Prods., Inc.,* 989 F.2d 1256, 1264 (1st Cir. 1993); *Kale v. Combined Ins. Co.,* 924 F.2d 1161, 1169 (1st Cir. 1991). Because of the importance of this issue of statutory construction, however, we bypass Thurston's failure to raise the point earlier and consider the argument on its merits.

Sentencing Commission. On this theory, because good works departures are specifically authorized (albeit discouraged) by the guidelines, this court is not authorized to ask whether, in Thurston's case, such a departure

> (i) does not advance the objectives set forth in section 3553(a)(2); or
>
> (ii) is not authorized under section 3553(b)[.]

§ 3742(e)(3)(B). Instead, the argument goes, this court is bound to accept the judgment of the Sentencing Commission that good works departures are consistent with § 3553(a)(2) and (b), and accordingly must limit its review to whether a good works departure "is not justified by the facts of the case" under subparagraph (iii).

The government's response to this argument is less than clear. The United States contends that "[n]othing in [the PROTECT Act] limits consideration of the factors in § 3553(a)(2) or the Commission's intentions as set out [in] § 3553(b)(1)[] to unmentioned departures, as *amicus curiae* argues." That statement is true as a literal matter, but it does not answer the practical question raised by amicus: whether subparagraphs (i) and (ii) permit the courts of appeals to revisit the Commission's determination that a particular ground for departure (*e.g.*, exceptional good works) comports with those provisions. The government does not directly answer that question. It does, however, strongly oppose amicus's argument that the courts of appeals are barred from considering the purposes of sentencing, the structure and purposes of the sentencing guidelines, or similar aids in evaluating the propriety of departures in particular cases.

In the end, there is less to this dispute than meets the eye. For the reasons explained below, we agree with the defense that a court of appeals, in reviewing a departure under § 3742(e)(3)(B)(i) and (ii), must accept and may not look behind the Sentencing Commission's determination that a particular categorical basis for departure is permissible or impermissible. At the same time, we agree with the government that under subparagraph (iii), a court of appeals is free to weigh the purposes of sentencing, the intentions of the Commission, and any other relevant considerations in deciding whether a particular departure is "justified by the facts of the case." This reading both reaffirms the authority of the Sentencing Commission and broadens appellate review of sentencing departures on grounds not considered by the Commission.

We start with the focus of an appellate court's inquiry under § 3742(e)(3)(B). Although most of § 3742(e) is concerned with "the sentence" actually imposed, *see* § 3742(e) (preamble), subsection (e)(3)(B) directs the court of appeals to focus on the "factor" cited by the district court as the basis for granting a departure. *See* § 3742(e)(3)(B) ("the sentence departs from the applicable guideline range *based on a factor that. . . .*" (emphasis added)). Amicus argues, and we agree, that the initial question under § 3742(e)(3)(B) is whether the district court selected a categorical basis for departure that the U.S. Sentencing Commission has considered and authorized. Because the Commission has already declared certain factors to be permissible grounds for departure, Congress could not reasonably have intended § 3742(e)(3)(B) as a warrant to second-guess the Commission's policy judgments on those matters. If, on the other hand, the district court cited as its basis for departure a factor that the Commission has

not expressly considered, then the court of appeals must make its own determinations under subparagraphs (3)(B)(i) and (ii). Where, as here, the departure was based on a factor considered by the Commission (*i.e.*, exceptional good works), de novo review extends only to whether the departure was "justified by the facts of the case." § 3742(e)(3)(B)(iii).

Implicit in this conclusion is an analysis of the word "factor" in § 3742(e)(3)(B). That term, in this context, must be read to mean a categorical basis for departure, independent of the facts of the case (for example, "good works" generally). The PROTECT Act inserted a new subsection (j) in § 3742 that forthrightly equates the term "factor" with "ground of departure."[19] In addition, the sentencing guidelines themselves, before the PROTECT Act, employed the word "factor" to refer generally to a basis for departure. *See, e.g.*, U.S.S.G. § 5K2.0 (2002) ("Grounds for Departure"). The Supreme Court adopted the same usage in *Koon*. *See, e.g.*, 518 U.S. at 98 (referring to "whether a discouraged factor nonetheless justifies departure"). Interpreting the term "factor" in § 3742(e)(3)(B) to refer to

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[19] Section 3742(j) provides:

(j) *Definitions.* – For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

a categorical basis for departure is also consistent with this court's own guidelines cases, which have frequently used the term in that way. *See, e.g., United States v. Mejia*, 309 F.3d 67, 70 (1st Cir. 2002) (referring to "factors that are either encouraged or discouraged bases for departure"); *United States v. Bogdan*, 284 F.3d 324, 328 (1st Cir. 2002) (referring to "factors that are explicitly or implicitly proscribed by the Sentencing Guidelines as bases for departure").[20]

On the other hand, there is some support for the contrary view, inherent in the government's position, that

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[20] Amicus also points to evidence in the legislative history of the PROTECT Act that Congress was troubled by departures on unmentioned grounds. Representative Tom Feeney, the sponsor of the amendment that became § 401, was particularly interested in limiting such departures. Feeney stated that under the Supreme Court's decision in *Koon*, district judges were permitted to depart downward based on "any factor not explicitly disapproved by the sentencing commission. . . . So judges can make up exceptions as they go along." 149 Cong. Rec. H2422-23 (daily ed. March 27, 2003) (statement of Rep. Feeney). At a different point, Rep. Feeney referred to a need to prevent "ad hoc departures based on vague grounds, such as 'general mitigating circumstances.'" *Id.* at H2423.

These statements certainly illuminate one of Congress's purposes in the PROTECT Act, but they do not meaningfully assist our interpretation of § 3742(e)(3)(B). Rep. Feeney's concerns about unmentioned departures are consistent with the overarching purpose of the PROTECT Act to reduce the incidence of downward departures generally. Moreover, Congress apparently rejected Rep. Feeney's initial proposal to eliminate *all* departures on unmentioned grounds. *See id.* at 2420-21. And none of the parties has cited, and we have not discovered, any legislative history addressing the specific issue here: whether Congress intended the courts of appeals to engage in de novo review under subparagraphs (i) and (ii) of § 3742(e)(3)(B) even where the ground for departure selected by the district court has been expressly approved by the Sentencing Commission.

"factor" refers not to the categorical basis for departure but to the district court's fact-specific justification for departing in a particular case. For example, 18 U.S.C. § 3553(a), which was amended by the PROTECT Act, is entitled "*Factors* to be considered in imposing a sentence" (emphasis added), and it requires district courts to take account of such case-specific matters as "the nature and circumstances of the offense and the history and characteristics of the defendant." § 3553(a)(1). Nevertheless, we are persuaded that the word "factor" in § 3742(e)(3)(B) is better understood as a shorthand for a categorical basis for departure. Congress, in enacting the PROTECT Act, plainly employed the term in that way in § 3742(j), and we hold that it intended the word to have the same meaning in § 3742(e)(3)(B).[21]

It is also apparent that Congress did not intend § 3742(e)(3)(B)(i) and (ii) as a license for the courts of appeals to second-guess the Sentencing Commission's determinations that specific factors are permissible or impermissible. In Part K of Chapter 5 of the sentencing guidelines, the Commission has identified specific mitigating and aggravating factors that, in the Commission's view, may justify departure. *See* U.S.S.G. § 5K2.0 (2002 ed.)

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[21] This interpretation is also consistent with § 3742(f), another provision amended by the PROTECT Act. That section establishes the circumstances under which the court of appeals may remand a case for re-sentencing. Subparagraph (2) addresses remands in departure cases. In language obviously intended to mirror the substance of § 3742(e)(3), it permits the court of appeals to vacate a departure and remand if "the district court failed to provide the required statement of reasons in the order of judgment and commitment, *or the departure is based on an impermissible factor,* or is to an unreasonable degree. . . ." § 3742(f)(2) (emphasis added).

("[T]his subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. . . . Presence of any such factor may warrant departure from the guidelines. . . ."). The Commission has also prohibited departures based on certain factors. *See, e.g.,* § 5H1.10 (race, sex, national origin, creed, religion, and socio-economic status); § 5K1.2 (defendant's refusal to assist authorities in investigating other persons); *see also* U.S.S.G. § 5K2.0(d) (Nov. 2003 ed.) ("Prohibited Departures"). For appellate courts to revisit such determinations anew in every case would undermine the authority of the Sentencing Commission, reduce uniformity in sentencing, and risk "recreat[ing] the location-based sentencing swings that Congress sought to minimize when it opted for a guideline paradigm." *United States v. Snyder,* 136 F.3d 65, 69 (1st Cir. 1998). Prior to the PROTECT Act, the Sentencing Commission's judgments were not open to such attacks. *See, e.g., Koon,* 518 U.S. at 95-96 (explaining that if the Commission has forbidden a particular ground of departure, "the sentencing court *cannot* use it as a basis for departure" (emphasis added)); *United States v. Rivera,* 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, J.) (even if forbidden factors are present to such an extent that the case is outside the relevant guideline's heartland, "the sentencing court is not free to consider departing"). There is no reason to think Congress intended to change that rule.

Accordingly, we hold that where the Commission has expressly considered and forbidden or approved (even if

discouraged) a particular factor for departure, the court of appeals is bound to accept that determination and cannot revisit it under subparagraphs (i) or (ii) of § 3742(e)(3)(B).[22] So in Thurston's case, because the Commission has determined that departures based on exceptional good works are authorized, we do not inquire whether such departures comport with subparagraphs (i) or (ii), and instead proceed directly to the question whether the departure "is not justified by the facts of the case." § 3742(e)(3)(B)(iii).

There is a second component, which we do not accept, to the defense's interpretation of § 3742(e)(3)(B). Amicus argues that in evaluating whether a departure on a particular ground is "justified by the facts of the case" under subparagraph (iii), this court may not refer to the underlying purposes of sentencing, the Commission's intent in its guidelines and policy statements, or other extra-record considerations. The reason, amicus says, is the same: it is the province of the Commission to weigh such considerations, and Congress could not have intended the court of appeals to re-weigh those issues when reviewing a specific sentencing departure.

We reject this argument for several reasons. First, the PROTECT Act asks whether the departure is "justified" by

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[22] This conclusion is slightly different from amicus's position that subparagraphs (i) and (ii) simply "do not apply" to mentioned departures. There is no basis in the statute to hold those subparagraphs *inapplicable* to certain types of departures. Properly framed, the question is whether a ground for departure endorsed by the Commission can ever fail the tests set forth in § 3742(e)(3)(B)(i) and (ii). We answer that question in the negative.

the facts of the case. That calls for an evaluative judgment, not a mechanical exercise. *See* Webster's Third New Int'l Dictionary 1228 (1993) ("justify" means "to prove or show to be just, desirable, warranted, or useful"). Nothing in the statute purports to constrain the sources that the reviewing court may consider. Second, we see no serious risk that the Commission's legitimacy or authority will be undermined if a court of appeals refers to the purposes of sentencing, the goals of the guidelines, or other policy considerations in determining whether, on the facts before the court, a particular defendant fits within a particular categorical "factor."[23] Third, those considerations were a regular part of the test that Congress required of the courts of appeals under § 3742(e)(3) even prior to the PROTECT Act.[24]

Fourth, the district court not only may but *must* consider the purposes of sentencing and the Commission's relevant guidelines and policy statements when it imposes a sentence. *See* 18 U.S.C. § 3553(a); *see also id.* § 3553(b) ("In the absence of an applicable sentencing guideline, the

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[23] Hypothetically, the Commission's statutory authority could be undercut if an appellate court were to construe an approved basis for departure so narrowly that, as a practical matter, no set of facts could ever qualify. But that circumstance is extremely unlikely and, in any event, is not presented here.

[24] Before the PROTECT Act, § 3742(e)(3) simply required the court of appeals to determine whether the sentence imposed by the district court was "unreasonable" in light of, *inter alia*, "the factors to be considered in imposing a sentence." 18 U.S.C. § 3742(e)(3) (2000). Those factors, which appear in § 3553(a), include the purposes of sentencing. *See, e.g., United States v. Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (referring to the "sentencing system's purposes" in rejecting a downward departure).

court shall impose an appropriate sentence, having due regard for the purposes [of sentencing] set forth in subsection (a)(2)."). The PROTECT Act requires this court to apply de novo review under § 3742(e)(3)(B)(iii), and it would be anomalous for Congress to have required plenary review but restricted the sources of law or fact that may inform that review. Adopting amicus's interpretation would produce the counterintuitive conclusion that Congress, in expanding appellate review of departures in the PROTECT Act, simultaneously prevented the courts of appeals in some cases from reviewing aspects of the district court's reasoning. Congress could not have intended such a result.

For similar reasons, we reject the government's suggestion that we adopt bright-line rules against the consideration of certain kinds of information in our exercise of de novo review under subparagraph (3)(B)(iii). In particular, the government urges that we cannot consult district court opinions (at least to the extent not tested on appeal) or databases of sentencing decisions. Nothing in the PROTECT Act precludes us from considering such sources. To be certain, experience gained under the Act with the passage of time may show that particular kinds of information have greater or lesser value. Databases of sentencing outcomes, for example, may or may not prove pertinent, depending on their scope and the types of information they report. But we decline to adopt any mechanical rule restricting the information that the court may consider under § 3742(e)(3)(B)(iii).

(d) Deferential Review After the PROTECT Act

We also reject a final argument by the defense, said to be drawn from *Ornelas v. United States,* 517 U.S. 690 (1996), that de novo review involves deference not only to the district court's determinations of historical fact, but also to its ultimate conclusions – for example, whether a defendant's good works are "exceptional." It is true that in sentencing cases, "appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case." *United States v. Diaz-Villafane,* 874 F.2d 43, 49-50 (1st Cir. 1989). We do agree that this court must defer to a sentencing court's findings of historical fact, even after the PROTECT Act. The Act did not alter the provision in § 3742(e) that the district court's findings of fact must be accepted unless clearly erroneous. *See* § 3742(e). Other circuits agree with this interpretation of the Act. *Mallon,* 345 F.3d at 946; *Jones,* 332 F.3d at 1300 n.9. Indeed, the government concedes this point. To the extent amicus suggests that the court of appeals should defer to the district court's application of the departure guidelines to the facts, however, its argument is refuted by the plain text of § 3742(e). After the PROTECT Act, that kind of deference is not ours to give.

2. The Downward Departures

The government argues that each of the stated grounds for downward departure was in error.[25] First, it contends that the district court was forbidden to depart downward based on a disparity between Thurston's sentence and the sentence of the company president, a

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[25] The court stated:

> [I]n granting the motion for downward departure, I'm basing it on two grounds.
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> First, the downward departure is justified because of the defendant Thurston's record of charitable work and community service[, which] is unique, extensive and extraordinary. I think the record should reflect that in over fourteen years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church.
>
> And the second ground is that which is set out in the United States Sentencing Commission Guidelines Manual under Chapter 1, Part A, Section 3, which is entitled . . . "The Basic Approach, paren, policy statement, closed paren," setting forth the rationale of the guidelines, it's cited here that Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.
>
> Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.
>
> We have a situation here where coconspirator Isola, the president of Damon and the architect, at least the prime architect of this conspiracy, received a sentence of three years' probation, and it is, in my judgment, a violation of the fundamental purpose of the Sentencing Commission Guidelines to impose a sentence which is not at least somewhat similar to that incurred by a coconspirator who was more involved in the conspiracy t[h]an this defendant.

cooperating co-conspirator who pled guilty. Second, it argues that departures for good works are discouraged, and that the facts do not justify a finding that Thurston's good works are so exceptional as to warrant such a departure.

(a) Disparity With Co-Defendant

The district court felt there was an unfair disparity between a five-year sentence of imprisonment for Thurston and the three-year probation sentence for co-conspirator Isola. It viewed Isola as "the architect, at least the prime architect of this conspiracy." Apparently the district court felt that Isola, Thurston's superior, was the guiltier of the two, and that this fact overshadowed other differences between their cases. Isola pled nolo contendere to willful blindness about the apolipoprotein conspiracy.

As the law of this circuit makes clear, basing the departure on grounds of disparity in sentence alone between Thurston and Isola was beyond the district court's authority. *United States v. Wogan,* 938 F.2d 1446, 1448 (1st Cir. 1991); *see also United States v. Romolo,* 937 F.2d 20, 25 n.5 (1st Cir. 1991). Sidestepping circuit precedent, the district court referred to a statute that requires a sentencing court to consider not only the Commission's Sentencing Guidelines and policy statements, but also "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This provision was unchanged by the PROTECT Act.

Yet the same statute also requires that the court "shall impose a sentence of the kind, and within the range [of the pertinent Guidelines], unless the court finds that

there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b)(1). That is why, since as early as 1991, this court has interpreted the statute to preclude sentencing judges from departing downward based on "a perceived need to equalize sentencing outcomes for similarly situated co-defendants, without more." *Wogan*, 938 F.2d at 1448 (emphasis added).

The "more" that is needed refers to circumstances not adequately considered by the Commission, and none have been shown here with regard to disparity. In the pre-guidelines era, the district court's attempt to avoid perceived unfairness would have had greater weight. The guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible.

(b) Good Works

The second ground, based on Thurston's good works, poses the most difficult issue in the case. We have found disparity alone an impermissible ground; it is possible the trial court would not have granted so extensive a departure based on good works alone. It may also be that if the court had granted a modest departure on the second ground, the government would not have appealed. But the trial court did not differentiate and the government on appeal argues that any departure at all based on good works (like the departure for disparity) was contrary to law.

The sentencing guidelines discourage downward departures from the normal sentencing range based on

good works – that is, civic, charitable, or public service. U.S.S.G. § 5H1.11. Such departures are permitted only when the good works are "exceptional."[26] *See* U.S.S.G. ch. 5, pt. H, introductory cmt. (departures based on discouraged factors should occur only "in exceptional cases"); *Koon*, 518 U.S. at 95; *United States* v. *Pereira*, 272 F.3d 76, 80 (1st Cir. 2001). The district court based its conclusion that Thurston's good works were exceptional on Thurston's "record of charitable work and community service[, which is] unique, extensive and extraordinary." The court continued, "I think the record should reflect that in over fourteen years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially . . . to his church." Thurston is a member of a church, tithes ten percent of his income, and devotes hours every week to unpaid service with the church in a variety of positions. Letters from his fellow congregants characterize him as a man of principle and impeccable character[27] – characterizations undermined, of course, by the jury's finding of guilt. In any

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[26] Good works may also be considered in setting a sentence within the guidelines range or in setting certain conditions. This does Thurston no good, however, since the applicable guidelines range is sixty-three to seventy-eight months, all above the statutory maximum of sixty months.

[27] During the trial, numerous witnesses for both sides testified to Thurston's reputation for honesty and integrity. During the sentencing phase, many of Thurston's friends and family members explicitly or implicitly said they thought the jury verdict was incorrect.

Good character is covered by the aberrant behavior guidelines, and there is no argument on appeal that Thurston was entitled to a departure on those grounds.

event, it is Thurston's record of good works, objectively measured, and not his good character that is at issue.

In addition to his church activities, Thurston has taken family members and others into his home and has been helpful to his neighbors. For example, the parents of a woman undergoing rehabilitation at a local medical center stayed at Thurston's home for several weeks. On another occasion, Thurston and his family laid sod for an infirm neighbor. Save for his crime, Thurston appears to have lived a creditworthy life.

The issue, however, is not whether Thurston engaged in "good works" within the meaning of § 5H1.11 – plainly he did – but whether those works were exceptional enough to overcome the judgment of the Sentencing Commission that a record of good works is a discouraged basis for departure – that is, good works are "not ordinarily relevant" to the decision whether to depart from the guidelines. § 5H1.11. We hold that a departure for good works was not justified on the facts of this case.

This circuit, even before the PROTECT Act, reversed departures based on discouraged factors where the record did not indicate that the defendant's circumstances were genuinely exceptional. For example, in *United States v. Bogdan,* 284 F.3d 324 (1st Cir. 2002), the defendant was a caring and generous father who had gone out of his way to support his ex-wife and who had expressed deep remorse for his crime. This court concluded that Bogdan's case was not so exceptional as to qualify for a downward departure based on either family responsibilities or acceptance of responsibility, both of which are discouraged factors. *See id.* at 329-30. When, on remand, the district court again

granted a downward departure because it thought Bogdan's sentence "unconscionable," this court again reversed. *See United States* v. *Bogdan*, 302 F.3d 12, 15, 16-17 (1st Cir. 2002). The *Bogdan* cases illustrate that the "exceptional case" hurdle for discouraged departures is a very high one. *See also Pereira*, 272 F.3d at 82-83 (family responsibilities departure, a discouraged factor, requires a showing of something akin to irreplaceability to qualify as exceptional); *United States v. Craven*, 239 F.3d 91, 100 (1st Cir. 2001) (departure on discouraged ground of extraordinary presentence rehabilitation requires, at a minimum, a showing of a fundamental change in attitude).

The case law under § 5H1.11 offers little guidance as to when a defendant's good works may be characterized as exceptional. What is clear, however, is that the problem is not merely one of quantity. The context of the defendant's good works is important. Here, Thurston's position as a prominent corporate executive weighs in our analysis. It is hardly surprising that a corporate executive like Thurston is better situated to make large financial contributions than someone for whom the expenses of day-to-day life are more pressing; indeed, business leaders are often expected, by virtue of their positions, to engage in civic and charitable activities. Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot. *See United States v. Morken*, 133 F.3d 628, 629-30 (8th Cir. 1998) (reversing a downward departure because the defendant's good works were not exceptional in light of his income and preeminence in a small town); *United States v. Kolbach*, 38 F.3d 832, 838-39 (6th Cir. 1994) (vacating a good works departure because "it is *usual* and *ordinary*, in the prosecution of similar white collar crimes involving

high-ranking corporate executives ... to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts" (emphasis in original)); *United States v. McHan*, 920 F.2d 244, 248 (4th Cir. 1990) (similar).

Thurston's religion plays no role in our analysis of whether his good works are exceptional. It is a neutral fact. *Cf.* § 5H1.10 (religion is "not relevant in the determination of a sentence").

The purposes of the sentencing guidelines, by contrast, are highly relevant. One of the goals of the entire guidelines regime was to minimize discrepancies in the treatment of "white collar" and "blue collar" crimes. Congress and the Sentencing Commission were clear that under the pre-guidelines regime, sentences for white collar crimes were too lenient.[20] The Commission intended its

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[20] *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 Loy. U. Chi. L.J. 359, 372-76 (2003) (discussing the Sentencing Commission's concern that white-collar crimes have been "grossly under-sentenced"); *id.* at 396-401 (collecting data on the under-sentencing of white-collar crimes and arguing that the prevalence of downward departures in white collar cases threatens to undermine the integrity of the Sentencing Guidelines); *see also* Testimony of Sentencing Commissioner Stephen Breyer Before the Senate Committee on the Judiciary, Oct. 22, 1987, *reproduced in* 146 PLI/Crim 811, 824 (1987) ("[T]he Commission considers present sentencing practices, in which white collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair."); 28 U.S.C. § 994(m) (2000) ("The [Sentencing] Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."). The recent enactment of enhanced penalties for many white collar crimes only underscores Congress's disinclination towards leniency for white

(Continued on following page)

guidelines and policy statements to "equalize punishments for 'white collar' and 'blue collar' crime." *United States v. Rivera*, 994 F.2d 942, 955 (1st Cir. 1993) (Breyer, J.).

Against that background, the nature of Thurston's offense mitigates against concluding that his good works are "exceptional." Health care fraud is a serious crime and the federal interest in combating it is powerful. The federal government spent approximately $249 billion on Medicare in 2002. One group has estimated that about three percent of the $1.4 trillion the country spent on health care in 2001 was lost to fraud.[20] *See* "A Sick Business," *The Economist*, June 28, 2003, at 64 (citing data from National Health Care Anti-Fraud Association); *see also* National Health Care Anti-Fraud Association, *Health Care Fraud*, at 2, *available at* http://www.nhcaa.org/pdf/all_about_hcf.pdf (n.d.). Health care fraud affects the financial integrity of programs meant to aid tens of millions of people in need of health care. Every dollar lost to fraud is a dollar that could have provided medical care to the elderly or the disabled. Almost by definition, Medicare fraud is white collar fraud, most often committed by

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collar criminals. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801-1107, 116 Stat. 745, 800-10.

[20] For other circuit court cases involving Medicare and Medicaid fraud, see *United States v. Baxtonbrown-Smith*, 278 F.3d 1348 (D.C. Cir. 2002) (fraud exceeding two million dollars); *United States v. Liss*, 265 F.3d 1220 (11th Cir. 2001) (kickback scheme for referrals); *United States v. Regueiro*, 240 F.3d 1321 (11th Cir. 2001) (fraud exceeding fifteen million dollars); *United States v. McClendon*, 195 F.3d 598 (11th Cir. 1999) (fraud exceeding three million dollars); and *United States v. Polin*, 194 F.3d 863 (7th Cir. 1999) (Medicare kickback scheme).

educated people with responsible jobs. Thurston's executive position at Damon, which gave him the resources to undertake many of his charitable works, also enabled him to perform the crime. That fact seriously undercuts Thurston's claim that his good works are "exceptional" in context.

Were it not for the statutory maximum, Thurston would have been sentenced to imprisonment for more than five years under the guidelines. Thurston's good works are admirable, but considered in context, they are not so exceptional as to justify reducing the sentence for the grave crime that he committed.

The downward departure for good works is reversed.

3. Upward Departure

The government's argument that Thurston's conduct warranted an upward adjustment for obstruction of justice based on perjury at trial need not be resolved, given our disposition of the other issues. The statute caps his period of incarceration at sixty months. It is noteworthy, though, that Thurston's testimony on key matters of fact was contradicted by multiple witnesses.

4. Fine

The government argues that the sentencing judge erred by failing to impose a fine on Thurston in accordance with the guidelines. Thurston argued, and the district court accepted, that he should not receive a fine because that would create an unacceptable disparity between his

sentence and that of co-defendant Isola. Sentence disparity is an unacceptable basis for refusing to impose a fine and is plain error for the reasons discussed earlier.

Thurston contends that the government has forfeited its argument that a fine must be imposed by failing to object after the judge ruled. The government earlier took the position that a fine must be imposed and also argued that the court could not refuse to impose a fine on the basis of disparity – the only argument Thurston presented. In these circumstances, the issue was not forfeited. *See Gallant,* 306 F.3d at 1187-88 (holding that a sentencing issue was not forfeited as a result of counsel's failure to object after the court's ruling); *cf. United States v. Meserve,* 271 F.3d 314, 325 (1st Cir. 2001) (motion to strike unnecessary to preserve evidentiary issue where party objected prior to trial court's ruling). Even were this an instance of forfeiture, the district court committed plain error in its rationale.

Before this court, Thurston attempts to defend the decision not to impose a fine on the basis that the statutory definition of his crime, which provides that a fine may be assigned, trumps the guidelines, which provide that a fine must be assigned barring special circumstances. The crime of which Thurston was convicted, 18 U.S.C. § 371, provides for a prison term, a fine, or both. By contrast, U.S.S.G. § 5E1.2(a) says, "The court shall impose a fine *in all cases,* except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." (emphasis added). The defendant did not establish, or even seek to establish, inability to pay. The sentencing judge made no finding, implicit or explicit, that Thurston could not pay. The PSR estimated that Thurston had a net

worth of over $1.5 million, and the minimum fine under the guidelines was $12,500.

Because the sentence fixed by U.S.S.G. § 5E1.2(a) is within the range contemplated by 18 U.S.C. § 371, the guideline is not trumped by the statute. *See United States v. Page,* 84 F.3d 38, 43 (1st Cir. 1996) ("There is no reason why the Guidelines may not make their own classifications within the statutes, and hence definitions which the courts must observe, so long as these are not internally inconsistent or in violation of the Constitution or a federal statute."). Here, there is no inconsistency and the district court was required to impose a fine.

V. CONCLUSION

Thurston's conviction is ***affirmed***. Thurston's sentence is ***vacated;*** the downward departure based on good works and purported disparity is ***reversed;*** and the order that no fine be imposed is ***reversed***. The case is ***remanded*** for imposition of the statutory maximum sentence of sixty months in prison and for imposition of an appropriate fine. ***So ordered.***

UNITED STATES COURT OF APPEALS
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,
Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,
Defendant, Appellee/Cross-Appellant.

JUDGMENT

Entered: February 4, 2004

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The conviction of William Thurston is affirmed. The sentence of William Thurston is vacated; the downward departure based on good works and purported disparity is reversed; and the order that no fine be imposed is reversed. The case is remanded for imposition of the statutory maximum sentence of sixty (60) months in prison and for imposition of an appropriate fine.

By The Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

UNITED STATES COURT OF APPEALS
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,
Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,
Defendant, Appellee/Cross-Appellant.

Before
Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez and Howard,
***Circuit Judges*.**

Order of Court
Entered: February 4, 2004

The panel opinion in this case, dated August 4, 2003, is withdrawn, and the judgment dated August 4, 2003, is vacated. A new panel opinion and judgment entered upon the docket this day. See Fed. R. App. P. 40.

Accordingly, the petition for panel rehearing and rehearing en banc, filed with the court August 28, 2003, is denied as moot.

By The Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

United States Court of Appeals
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,

Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,

Defendant, Appellee/Cross-Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, *Senior U.S. District Judge*]

Before

Lynch, Lipez, and Howard, *Circuit Judges.*

Michael K. Loucks, Assistant U.S. Attorney, with whom *Michael J. Sullivan*, U.S. Attorney, and *Susan G. Winkler* and *Gary S. Katzmann*, Assistant U.S. Attorneys, were on brief for the United States.

Matthew D. Brown, with whom *Joseph P. Russoniello* and *Cooley Godward LLP* were on brief for Thurston.

August 4, 2003

LYNCH, *Circuit Judge.* A jury convicted William Thurston, a vice president of Damon Clinical Testing Laboratories, Inc., of conspiring to defraud the Medicare program of over five million dollars. The fraud charged involved the manipulation of physicians into ordering unnecessary ferritin blood tests[1] for Medicare beneficiaries, in violation of 18 U.S.C. § 371 (2000).

The essence of the scheme charged was that Damon, through Thurston and others, bundled the ferritin blood test – previously ordered by doctors less than two percent of the time – into a panel of blood tests known as the LabScan – which was ordered thirty to forty percent of the time. When doctors or patients (instead of insurers) paid for the bundled LabScan, Damon provided the ferritin test for free, leading doctors to believe there was no extra charge for this test. Doctors were not told that, when Medicare paid for the bundled LabScan, Medicare was charged extra for the ferritin test. Indeed, both a letter and marketing materials indicated the added ferritin test was "free"; that is, that there was no charge beyond the standard LabScan charge. Those unnecessary ferritin tests were not free to Medicare. Damon charged Medicare roughly $21 per ferritin test on top of the approximately $24 charged for the LabScan. Nor were doctors told that the ferritin test could be ordered separately; the test requisition form did not offer that option. The physicians, then, were induced to order and to certify as medically

[1] The ferritin iron test measures the number of atoms per molecule of circulating ferritin. Ferritin is a binding protein which delivers iron to iron storage cells.

necessary a large number of ferritin tests which were not medically necessary.

The government's theory was that Damon did this to offset Medicare's 1988 reduction in reimbursement rates of sixteen percent, which was projected to cause Damon an estimated annual loss of $800,000 in revenues. In just one of Thurston's labs, the orders for ferritin tests were expected to increase from approximately three hundred per month to roughly ten thousand per month. Thurston testified that he was innocent, and neither had knowledge of nor responsibility for key components of the conspiracy. The jury disagreed.

Although the sentencing guidelines called for a sentence of sixty-three to seventy-eight months, the district court sentenced Thurston to only three months' imprisonment. It did so by granting a downward departure to "correct" a perceived disparity between a five-year sentence of imprisonment for Thurston and the sentence of three years' probation given to the company President, Joseph Isola, who had pled nolo contendere and assisted the government. Its second ground for departure was its sense that the good works Thurston did for his church and community were extraordinary.

This sentence outraged the prosecutors, who appealed, arguing that the district court lacked the power to depart downward for any of the reasons it gave, and that, even if a departure were appropriate, the extent of the departure was excessive. The government also appeals the district court's failure to impose a fine, on the basis that the Sentencing Guidelines, if not the statute, mandated a fine. Finally, the prosecution argues that if some departure for good works was warranted, the district court was

required to address an issue it avoided: the government's request for an upward departure on the basis that Thurston had obstructed justice by committing perjury on the witness stand.

Thurston also appeals, arguing that the conviction must be vacated because the prosecution was barred by the statute of limitations, because he was entitled to a jury instruction and to acquittal on the basis that he reasonably interpreted the law to mean he could rely on the physicians' certifications of medical necessity, and because of other errors. In addition, Thurston argues his sentence was too high because the sentencing base offense level calculation for amount of loss, either actual or intended, was unproven and excessive. Thurston also defends the downward departure.

Several important issues are raised by these appeals. The government's appeal requires us to address the effect of the new Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650,[2] on the standard the courts of appeals use to review downward departure decisions by district judges in sentencing, as well as the availability of a downward departure for a record of good works, U.S.S.G. § 5H1.11. Thurston's appeal invites, inter alia, clarification of the defense doctrine concerning a defendant's reasonable interpretation of the law; the issue of when a statute of limitations defense must be raised; the ramifications of a trial judge's failure to respond to

[2] This Act is also known as the Amber Alert bill. It includes changes put forward in the so-called Feeney Amendment.

jury instructions proposed by counsel; the evidence needed to show an intended loss; and the question of whether fines are mandatory.

In the end we sustain the conviction but find the sentence was in error.

I. Facts

We state the facts as the jury could reasonably have found them, including a fair description of the defense evidence.

A. Background

Medicare provides certain medical services and care, including clinical laboratory testing services, to persons aged sixty-five and older and to persons with disabilities. At the time of the conspiracy, Medicare was administered by the Health Care Financing Administration (HCFA), a division of the U.S. Department of Health and Human Services. HCFA in turn contracted with private insurance companies ("carriers" and "intermediaries") to handle claims for reimbursement to Medicare program beneficiaries. By law, Medicare only reimburses clinical laboratory services if those services were medically necessary for the treatment or diagnosis of a beneficiary's illness or injury. 42 U.S.C. § 1395y(a)(1)(A) (2000); *see also* 42 C.F.R. § 424.10(a) (1988). Medicare did not generally reimburse screening tests. Medicare reimbursed one-hundred percent of the cost of necessary clinical blood tests.

Damon was, at the time, a Massachusetts corporation that provided clinical laboratory testing services to

physicians, hospitals, health maintenance organizations, and their patients nationwide. Approximately thirty percent of Damon's revenues were from Medicare. Damon owned and operated a national system of clinical laboratories, and Damon was an approved Medicare provider. When Damon billed the Medicare program, it submitted to the carriers a HCFA 1500 form saying that it certified the lab tests were medically necessary. Physicians did not see those bills.

Thurston served as Regional Vice President of Damon from 1987 to 1990, and was responsible during all or part of this time for Damon's regional laboratories in Newbury Park, California; Phoenix; Chicago; and San Francisco. His office was at the Newbury Park lab; he traveled to the other labs and was in regular phone contact. Thurston was promoted to Senior Vice President of Operations in 1990. Thereafter, he relocated to the company headquarters in Needham, Massachusetts and supervised only the San Francisco lab. Another company purchased Damon in August 1993; Thurston later switched employers and moved to Utah.

B. Theories of Prosecution and Defense

The government's theory was that the defendants tricked doctors into ordering medically unnecessary tests, for which Medicare paid. Damon added little-used tests to more popular panels of tests; it then tricked doctors by concealing that the panels could be ordered without the added tests and that Medicare was being charged for the tests. To conceal from doctors that Medicare was being charged, and to encourage doctors to order ferritin tests regardless of medical necessity, the defendants charged

doctors and patients little or no extra fee for the added tests; provided literature saying that ferritin was provided free; otherwise failed to disclose to doctors the cost to Medicare of the expanded LabScan; and made it difficult to order the bundled test without ferritin.

The defense theories were that there was no conspiracy and, if there were, then Thurston was not a knowing participant. The defense contended that Damon complied with existing Medicare regulations, which neither prohibited bundling nor imposed a requirement on the lab to disregard a physician's certification that tests were medically necessary. It further argued that even if Thurston's interpretation of the regulations was incorrect, it was objectively reasonable, and so Thurston lacked the required criminal intent. Thurston's defense was also that any fraud was carried out by his subordinates, without his knowledge. He testified that he did not instruct the labs to add ferritin; did not authorize or condone any decision to forego a fee increase for doctors or private-pay patients on the expanded LabScan; did not instruct subordinates to conceal that doctors could order a LabScan without ferritin; and had nothing to do with requisition forms or particular pieces of marketing literature.

C. Evidence of Conspiracy to Defraud

1. Addition of Ferritin

In late 1987, HCFA announced that effective April 1, 1988, Medicare would reduce by almost sixteen percent the fees paid to laboratories, including Damon, for providing clinical laboratory services to beneficiaries. If Damon maintained its existing practices and fee structure, then Damon would lose $800,000 in revenues during the first

year alone, as Thurston knew. Of that amount, more than $500,000 of the annual losses would occur at Thurston's four regional laboratories.

There were corporate discussions, which included Thurston, about how to offset this loss. As a result, Damon added its ferritin test to the LabScan, a panel of more than a dozen blood chemistry tests performed by a single machine on one blood sample. The ferritin test was performed on separate equipment. Damon bundled ferritin with the LabScan from 1988 to at least mid-1993. The LabScan had been requested on at least thirty-five to forty percent of the orders submitted to Thurston's regional laboratories. By contrast, doctors rarely ordered the ferritin test. The general manager of one of the laboratories Thurston oversaw estimated that only one to two percent of the orders for blood tests included a request for a ferritin test.

Nothing in the medical literature at the time showed ferritin was necessary for all persons receiving LabScans. Indeed, it was not. A family practitioner testified that he needed ferritin less than ten percent of the time it was included as part of the LabScan. Similarly, an internist testified that he needed the ferritin test for very few of his Medicare patients.

The plan to add ferritin to the LabScan was discussed at a general managers meeting in January 1988 and at a mid-year financial meeting for the western region in March 1988. Thurston attended both meetings. In late March, Thurston personally approved the addition of

ferritin to the LabScans offered by the Newbury Park, San Francisco, and Phoenix labs.[3] Thurston initially acquiesced when the Phoenix lab sought permission not to add ferritin; in August 1988, however, after Thurston saw the financial results from the addition of ferritin at his other labs, Thurston ordered the Phoenix lab to add the test to the LabScan.

Thurston presented evidence that the decision to add ferritin was made at a lower level for legitimate reasons. Thurston and Isola testified that at the general managers meeting in early 1988, management decided to allow individual laboratories to determine whether to add ferritin to the LabScan. There was also testimony that Damon's sales force made requests to the sales managers and general managers of individual labs to add ferritin to the LabScan, on the grounds that the new test would make the panel more competitive.

2. Differential Charging for Ferritin Test

a. Thurston's Knowledge of Price Differential

Medicare provided one reimbursement for the ferritin test and a separate reimbursement for the LabScan panel. In 1988, for example, Medicare paid $24.05 for a LabScan and $20.86 for a ferritin test.

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[3] There was abundant evidence that Thurston instructed his subordinates to add ferritin. For example, the general manager of the Chicago lab had contemporaneous notes of a conversation with Thurston in 1988 indicating that Thurston told him to add ferritin to the LabScan. The manager of the San Francisco lab also testified that Thurston called him and told him to add the ferritin test to the LabScan.

Thurston's labs submitted to him capital expenditure requests (CERs) to help with the decision whether to bundle the tests. CERs were financial projections comparing the additional revenues (from Medicare reimbursements) and costs (partly from the purchase of new equipment) that would result from the addition of ferritin to the LabScan.[4] These CERs assumed there would be no increase in the charge to doctors and patients for a LabScan with ferritin. Thurston discussed and then signed the CERs. They projected losses of revenue from doctors and patients (who would receive free ferritin tests) and massive increases in revenue from Medicare reimbursements. One lab, for example, projected that the number of ferritin tests performed for Medicare beneficiaries would grow from 25 per month to 1,946 per month – increasing revenues by $10,308 per month. Overall, Thurston's labs projected that they would increase their Medicare reimbursements by approximately $1.16 million per year by adding ferritin to the LabScan; if multiplied by five years, this increase would be $5.8 million. The capital expenditure requests were best-case projections, assuming that every doctor who would otherwise have ordered a LabScan without ferritin would now order a LabScan with ferritin.

Damon sought reimbursement (at different rates) for ferritin tests from Medicare, CHAMPUS,[5] and other

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[4] The defense argues that the CERs were prepared for the related purpose of justifying, to Damon executives, the purchase of equipment to carry out a higher volume of ferritin tests.

[5] CHAMPUS is the Civilian Health and Medical Program of the Uniformed Services, a health benefit and insurance program for dependants of military personnel that is administered by the Department of Defense.

insurers, but provided them for free to doctors and patients. Thurston said he was unaware doctors were not being charged. But Thurston approved the decision by a number of his labs to adopt this policy of differential pricing depending on the client, and the CERs assumed no price increase for doctors and patients. Thurston instructed a subordinate to add ferritin at no charge to doctors; Thurston was present at a meeting in which another executive announced the no-charge policy; and Thurston received a memo saying that there was no price increase for doctors at a lab he oversaw. Witnesses testified that physicians are highly price-sensitive about charges for lab work and might object to the automatic inclusion of ferritin unless the test were provided for free. At least initially, many or all of Thurston's labs increased the charge to private insurance companies for a LabScan based on the addition of ferritin. However, any price increase for private insurers on the expanded LabScan was much smaller than the cost increase to Medicare.

Thurston presented evidence that two of his labs did increase the price for physicians; that this price increase provoked complaints by doctors; that he was informed of these complaints; and that he responded that doctors could not obtain a LabScan with ferritin unless they paid the higher price. He also presented evidence that the no-charge approach was a deviation from corporate policy and was initiated by the heads of individual labs; that he did not find out about any price differential until years after it had been implemented; and that he sought to correct any price differential as soon as he discovered it. Thurston testified that he did not authorize, condone, or ratify a decision not to increase the price of the LabScan based on the addition of ferritin.

b. Concealing Price Differential from Doctors

Thurston's labs took steps to conceal from doctors that, in addition to the LabScan charge, Medicare would pay an extra fee for the ferritin tests. No letters were sent to doctors advising them that Medicare would be charged separately for the ferritin test. To the contrary, in April and May 1988, letters were sent to physicians notifying them that the ferritin test was going to be automatically added at "no extra cost." In Newbury Park, stickers were also printed and added to physicians' brochures and directories saying, "Ferritin Automatically Included at No Charge." Of course, as to Medicare patients, these statements were untrue.

Thurston testified that he did not pre-approve the letters or stickers saying ferritin would be provided free to customers. Thurston portrayed himself as a hands-off manager who trusted subordinates to build in a charge to physicians and to accurately promote the expanded LabScan.

Several physicians testified they were initially unaware that Damon charged Medicare for the ferritin component of the expanded LabScan. A number of Damon customers protested, and even switched labs, when they belatedly discovered Damon was charging Medicare for ferritin tests conducted as part of the LabScan. When doctors told Damon sales representatives that they did not need the additional test, some were told that a LabScan without ferritin would cost more than a LabScan with ferritin. A major client referred Damon to a newspaper article criticizing the practice of bundling tests into panels and profiles, and warned Damon that its failure to educate doctors about the composition of and alternatives to its

panels would subject it to ongoing criticism. Thurston was informed of these complaints, which were written up in monthly management reports he received in 1989 and 1990. Despite these complaints, Thurston did not cause a letter to be sent to doctors informing them of the extra charge for ferritin to Medicare.

Damon also collaborated with HMOs operating on a capitation basis (i.e., paying a flat monthly fee for each HMO member) to reduce utilization of bundled tests such as the LabScan. For example, one of Thurston's labs added to its HMO requisition form a checkbox for a LabScan without ferritin. Damon made no such effort to assist Medicare.

3. Availability of LabScan Without Ferritin

Thurston instructed subordinates to take specific steps that hid the fact that the LabScan could be ordered without ferritin and made it difficult for doctors to order the LabScan separately. For example, Thurston told the general manager of the Newbury Park lab not to advertise or promote the fact that doctors could still order a LabScan without ferritin. Similarly, Thurston helped make the decision to omit, from the Newbury Park letter announcing to doctors the addition of ferritin to the LabScan, the test code for ordering a LabScan without ferritin. The standard requisition forms used by Thurston's labs did not change following the addition of ferritin to the LabScan; there was a checkbox for the "LabScan" (which now included ferritin) but no box for the "LabScan without ferritin" or the "LabScan with ferritin."

During the conspiracy period, there were at least two ways for doctors to order the LabScan without ferritin.

They could handwrite such an order on a standard requisition form, or they could request and obtain a customized requisition form with a checkbox for the LabScan without ferritin. A number of doctors and institutions took advantage of these options.

Thurston testified that he did not tell anyone to conceal or refrain from advertising that the LabScan could be ordered without ferritin. There was testimony that, after Thurston learned in 1991 that the front of a requisition form used by one of his labs did not disclose the inclusion of ferritin in the LabScan, he instructed a subordinate to list it on the front and the form was so amended.

4. Apolipoprotein

Damon also added an apolipoprotein test to its coronary risk panel in 1989. Before apolipoprotein was added to the panel, clients ordered it very rarely. The standard requisition forms Damon used after adding apolipoprotein to the panel also did not offer a checkbox for a coronary risk panel without apolipoprotein. Following the addition of apolipoprotein, the cost to doctors of the coronary risk panel increased by five dollars. Medicare reimbursed apolipoprotein separately at a rate well above five dollars. Thurston participated in the decisions about the addition, the requisition forms for, and the extra charges for apolipoprotein.

D. Thurston's "Reasonable Interpretation" as Evidence of Lack of Criminal Intent

Thurston presented evidence that from 1988 to 1993 it was an industry-wide practice for labs to rely on the

doctors who ordered tests to make determinations of medical necessity. Because, prior to 1994, doctors did not normally share their diagnoses with labs, labs did not have the information required to gauge medical necessity. Damon employees did not believe that they certified tests as medically necessary when they submitted HCFA 1500 forms with Medicare bills. Instead, they believed it was the doctors who ordered LabScans who made the certification.

Two expert witnesses testified that it was appropriate in 1988 to include ferritin in a blood chemistry panel. The bundling of different tests into panels was lawful under Medicare regulations. There was testimony that technological changes during the 1980s made it possible to automate the ferritin test, which presumably made it much cheaper to conduct. Witnesses for both sides testified that by 1988 some of Damon's competitors offered ferritin as part of their blood chemistry panel and so Damon added the test to stay competitive.

II. Procedural History

A. Indictment and Trial

On January 22, 1998, a thirty-nine paragraph single-count indictment charged Thurston and three other former Damon executives – Joseph Isola, Beno Kon, and Gerald Cullen – with conspiring to defraud HCFA in violation of 18 U.S.C. § 371[6] by causing doctors to order unnecessary tests by adding a test for ferritin to a pre-existing panel of

[6] Damon was separately indicted for conspiracy to defraud HCFA, on the basis of the same events.

diagnostic blood tests, and by adding a test for apolipoproteins to a profile used to assess coronary artery disease. The conspiracy period was from July 1987 to August 1993.

Isola, President of Damon, pled no contest and, pursuant to his plea agreement, was sentenced to three years' probation and a one-hundred dollar special assessment. Kon, Corporate Controller, died during the proceedings. Cullen, Senior Vice President for Operations, was tried before the district court in October 2001 and acquitted at the close of the government's evidence. In addition, Damon pled guilty on October 11, 1996 to conspiracy to defraud by bundling ferritin with the LabScan and apolipoprotein with the cardiac risk panel. The company was sentenced to pay a $35,273,141 fine, and later entered into a civil settlement under which it paid the United States and the state Medicaid programs an additional $83,756,904.

Thurston was tried before a jury in November and December 2001. The trial lasted three weeks. At the close of the government's evidence, the district court granted Thurston's motion for judgment of acquittal as to the indictment's apolipoprotein allegations, ordered these allegations stricken, and explained to the jury that only the ferritin allegations remained. The jury found Thurston guilty. Thurston's subsequent motions for judgment of acquittal and for new trial were denied. The procedural rulings at trial which Thurston attacks are described below.

B. Sentencing

The district court sentenced Thurston to three months' imprisonment (with a judicial recommendation

that the term be served in a halfway house), followed by twenty-four months of supervised release (of which the first three months were to be served in home detention). The court imposed a one-hundred dollar special assessment and no fine. The Pre-Sentence Report (PSR) had recommended a Total Offense Level of twenty-six and a Criminal History Category of one. The PSR identified the base offense level as six. It recommended a fourteen-level upward enhancement for an intended loss of at least five million dollars; a two-level enhancement for more than minimal planning; and a four-level enhancement for a leadership role. It also suggested that an enhancement for obstruction of justice was appropriate, on the grounds that Thurston perjured himself at his trial. The PSR recommended the statutory maximum term of sixty months' imprisonment and noted that both the statute and the guideline allowed for a fine. It calculated that Thurston had a net worth of $1,526,904.

The defense contested the PSR's recommendations. Thurston requested a three-level decrease because the substantive offense of defrauding the United States was incomplete; a four-level decrease because Thurston was a minimal participant; and a two-level decrease for acceptance of responsibility. Thurston requested a downward departure on the grounds that he had an extraordinary record of charitable work and community service; that the offense constituted aberrant behavior; and that there was the potential for a large disparity with Isola's sentence.

The government argued that Thurston should receive a two-level upward enhancement for obstruction of justice. Otherwise, it accepted the recommendations of the PSR. The parties agreed that any restitution had been made by Damon, the corporate defendant.

The district court sentenced Thurston at a hearing on June 26, 2002 to three months' imprisonment, a period of supervised release, and no fine. The district court granted a fourteen-level enhancement for the size of the intended loss, *see* U.S.S.G. § 2F1.1(b)(0) (1992 version),[7] a four-level enhancement for an aggravated role in the offense, *see* U.S.S.G. § 3B1.1(a) (1992 version), and a two-level enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2) (1992 version). The court did not explicitly rule on the government's request for an obstruction of justice enhancement, *see* U.S.S.G. § 3C1.1 (1992 version), or Thurston's request for a three-level decrease for failure to show completion of the substantive offense, *see* § 2X1.1 (1992 version). Thurston's adjusted offense level of twenty-six and criminal history category of one yielded a guidelines sentencing range of sixty-three to seventy-eight months' imprisonment; this range was trumped by the statutory maximum of sixty months for a violation of 18 U.S.C. § 371.

During the hearing, the government confirmed that Thurston had been offered (and had rejected) a plea agreement "along the lines" of the one that Isola had accepted. Over the government's objections and arguments, the

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[7] U.S.S.G. § 2F1.1 was deleted by consolidation with U.S.S.G. § 2B1.1 effective November 1, 2001. *See United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77 n.3 (1st Cir. 2002). Under the current Guidelines, a loss exceeding $2.5 million warrants an *eighteen*-level upward enhancement. U.S.S.G. § 2B1.1(b)(1). When the Guidelines in effect at the time of sentencing are more stringent than those in effect at the time of the offense, the latter are normally used, partly to avoid any hint of an ex post facto increase in penalty. *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (citing *United States v. Harotunian*, 920 F.2d 1040, 1041-42 (1st Cir. 1990)).

district court then departed downward on the basis of Thurston's record of charitable work and community service and the disparity between Thurston's and Isola's sentences. The court then solicited the government's recommendation about the extent of the departure. The government responded that, if the court chose to depart, then it should depart no further than the sentencing guidelines for a perjury conviction, which would be an offense level of twenty (six less than that of the underlying offense), for a sentencing range of thirty-three to forty-one months' imprisonment. The court then departed by at least sixteen levels.

The government appealed the sentence and Thurston appealed his conviction and sentence.

III. Thurston's Appeal from his Conviction

Thurston was convicted under 18 U.S.C. § 371, which provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

A. Statute of limitations

Thurston argues that the trial court erred in not granting his post-verdict Rule 29 motion for acquittal, because the government had not proved an overt act during the limitations period, and in not sua sponte instructing the jury on the statute of limitations.

The statute of limitations for 18 U.S.C. § 371 crimes is the general five-year statute of limitations contained in 18 U.S.C. § 3282. Here, that five years ran back from January 22, 1998, the date of the indictment, less the six weeks during which Thurston agreed to toll the limitation period. The government, therefore, had to prove an overt act was done on or after December 11, 1992. The indictment properly alleged at least eight overt acts within the limitations period.

Thurston did not raise the defense of statute of limitations either before or at trial, did not request an instruction on the defense, and did not object when the judge instructed without addressing the issue. Thurston first raised the issue by Rule 29 motion after the verdict. The government says Thurston raised the issue too late. There is a preliminary question of when such a motion should be raised, a question affecting our standard of review.

"The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . . " *Biddinger v. Comm'r of Police*, 245 U.S. 128, 135 (1917). Here the indictment adequately pled facts to establish that the crime was within the limitations period. Thurston was not required to raise the defense before trial under Rule 12(b)(3), Fed. R. Crim P. Nor would it have made sense for him to do so, since the defense depended on what the government proved or failed to prove at trial. In a criminal case a defendant need only plead as to the accusation of guilt in the indictment and need not raise the statute of limitations as an affirmative defense before

trial.[8] Thurston mistakes these truisms for an argument that he need not raise the limitations defense at all before the jury delivers a verdict of guilt.

The government says Thurston has waived[9] the issue and may not raise it at all. Absent an explicit agreement to waive the defense, we treat the issue as a forfeiture and not a waiver, contrary to the government's argument. This was not an intentional relinquishment or abandonment of a known right, the definition of a waiver. The issue of failure to assert the defense was viewed as forfeiture in *United States v. O'Bryant*, 998 F.2d 21, 23 n.1 (1st Cir. 1993). The rule we use – that the defense of statute of limitations must be raised at trial and, if not, is forfeited but not waived – is the rule in most circuits. *See United States v. Ross*, 77 F.3d 1525, 1536 (7th Cir. 1996) ("[I]t is widely accepted that a statute of limitations defense is forfeited if not raised at the trial itself.") (citing cases).

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[8] By contrast, in a civil case, a defense of statute of limitations must be raised in an answer or it is lost. Fed. R. Civ. P. 8(c); *In re Cumberland Farms, Inc.*, 284 F.3d 216, 225-27 (1st Cir. 2002).

[9] A defendant may waive the defense of statute of limitations by several means, including by entry of plea of guilty, *see Acevedo-Ramos v. United States*, 961 F.2d 305, 308 (1st Cir. 1992), or by a voluntary agreement, usually written, such as in a tolling agreement, *see United States v. Spector*, 55 F.3d 22, 24 (1st Cir. 1995). None of those situations is present here.

Thurston has indeed forfeited[10] the defense that the government did not prove facts that an overt act occurred within the limitations period. The defense should have been raised at trial. Waiting until after the jury has rendered a verdict of guilt to raise a limitations defense for the first time is inconsistent with the characterization of the statute of limitations as an affirmative defense and would unfairly sandbag the government.

Because this was a forfeiture and not a waiver, there is still plain error review available under Rule 52, Fed. R. Crim. P. *United States v. Olano*, 507 U.S. 725, 731-32 (1993). Our conclusion is straightforward. The government's evidence established overt acts by the conspirators within the limitations period, so there was no error at all as to the statute of limitations, much less plain error.

The government showed that labs overseen by Thurston (and his co-conspirators) submitted tens of thousands of reimbursement claims to Medicare after December 11, 1992 for ferritin tests conducted as part of LabScan orders. The government also presented ample evidence that many of these tests were medically unnecessary and were submitted by doctors unaware that Medicare would be charged separately for ferritin.[11] It was not

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[10] Our reasoning that the argument has been forfeited would be different if compliance with the limitations period were either jurisdictional or an element of the offense which the government had the burden of proving. Here, when the limitations defense is not an issue of law but is based on facts to be proven, the defense must be raised at trial at the latest.

[11] For example, government witness Dr. Johnson testified that he ordered the LabScan regularly for Medicare patients; rarely needed a ferritin test; and, when he discovered that Damon charged Medicare

(Continued on following page)

credible that the ferritin test, ordered less than two percent of the time, suddenly became medically necessary thirty to forty percent of the time within the life span of the conspiracy.

Thurston also argues he was entitled to a jury instruction on the limitations point. By failing to request a jury instruction and failing to object to the lack of an instruction, he has forfeited the argument. Fed. R. Crim. P. 30; *see United States v. Gallant*, 306 F.3d 1181, 1187 (1st Cir. 2002) ("[A] party unhappy with a trial court's jury instruction [must] promptly state the precise objection after the instruction has been given."). As there was no error, the plain error standard was not met. *See* Fed. R. Crim. P. 30, 52(b).

B. Purported Lack of Criminal Intent and the Requested Reasonable Interpretation Regulation

Procedurally, the issue of reasonable interpretation comes up in two ways: denial of Thurston's Rule 29 motions and denial of his request for a jury instruction. Thurston's three Rule 29 motions – at the end of the government's case, at the end of the defense case, and after the verdict – all argued that he lacked the needed criminal intent. Our review is of whether a rational fact finder could conclude, beyond a reasonable doubt, that the government proved the elements of the crime, including

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separately for ferritin, demanded that ferritin be removed from panels he ordered. As demonstrated by a lab report the defense introduced into evidence, Dr. Johnson continued ordering the LabScan with ferritin for Medicare patients through mid-1993.

intent. *United States v. Moran*, 312 F.3d 480, 487 (1st Cir. 2002). Thurston also requested a jury instruction on reasonable interpretation of the law[12] and preserved his objection to the court's rejection of the instruction.

Thurston argued he reasonably interpreted the law as requiring that the treating physician, not the test lab, certify to the HCFA that the test ordered was medically necessary and reasonable, and that he and the company were entitled to rely on that physician certification. Specifically, Thurston contended that in the relevant time period an independent clinical lab did not violate any aspect of Medicare law by: (1) providing physicians with a panel containing a ferritin test, so long as the physician was given reliable and accurate information about the test

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[12] The instruction he requested stated in part:

> Mr. Thurston contends that an independent clinical laboratory does not violate any aspect of Medicare law in providing physicians with a profile or panel that contains a serum ferritin test, so long as the physician is given reliable and accurate information about the test and the choice to select the profile or panel with or without the added test.
>
> Mr. Thurston also contends that an independent clinical laboratory does not violate any aspect of Medicare law in submitting a claim for reimbursement, using a HCFA form or otherwise, so long as the blood tests performed were ordered by a physician.
>
> I instruct you as a matter of law that these are reasonable interpretations of the Medicare statutes, regulations and rules.
>
> In order for you to find Mr. Thurston guilty on the basis that he caused physicians to order medically unnecessary tests for their patients, the government must prove beyond a reasonable doubt that these were not Mr. Thurston's interpretations of the pertinent Medicare laws.

and could select the panel without the test; or (2) submitting a reimbursement claim, using a HCFA form or otherwise, so long as a physician ordered the test performed. This is one of his primary arguments on appeal.

Whether a particular defense doctrine is germane depends on the crime charged and the facts of the case. This is where Thurston's argument falters. He argues that he could not have had the needed intent because employees of clinical labs, including Thurston, "were unaware that they were actually certifying the medical necessity of each test performed for every patient" and they could reasonably interpret the law to mean that the treating physician, not the laboratory, made the certification. The argument is beside the point.[13]

Thurston was not charged with making a false statement to the United States, the falsity of which turned on an ambiguity in what the law required. Nor was he charged with failing to make a statement required by law in a situation of parallel ambiguity. He was not charged with falsely certifying the medical necessity of the tests ordered. He was charged with the crime of conspiracy to defraud the United States by inducing physicians through deceit and trickery into certifying tests as medically necessary when the ferritin tests were not necessary, thus leading Medicare to pay for unnecessary services.

Thurston's knowledge of the Medicare regulations and of the fact that the ordering physicians would certify the

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[13] Thurston argues it would be nonsensical to ask clinical testing laboratories to guarantee that a test ordered by a doctor was in fact medically necessary. That question simply is not raised here.

medical necessity of the tests was, ironically, part of the proof of the crime, not a defense. Thurston cannot, under 18 U.S.C. § 371, knowingly conspire to mislead and manipulate doctors into certifying medically unnecessary tests which led to improper payment of Medicare funds and then defend on the basis that he committed no fraud because the doctors, not he, were the ones who certified the tests as necessary.

Thurston's reliance on *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001), is misplaced. *Prigmore* is part of a line of cases charging false statements or failure to make required statements, holding that intent should be measured against an objectively reasonable understanding of the legal requirements to be met, and that a statement is not in fact false or fraudulent if it is based on an objectively reasonable interpretation of that legal requirement. *See id.* at 17-18. This court first applied this principle in *United States v. Rowe*, 144 F.3d 15, 21-23 (1st Cir. 1998), to a statement that was not in fact false under an objectively reasonable interpretation of a disclosure requirement. In *Prigmore,* the conspiracy charged was to defraud and impair the functioning of the Food and Drug Administration, in connection with its oversight and regulation of medical devices, through failure to file reports which were required under certain conditions. The fraud alleged was the failure to submit a pre-market approval information supplement to the FDA, but whether such a supplement was required depended on the interpretation of certain regulations. The same conditional requirement was true of certain testing reports. The question was whether defendants could objectively and reasonably understand one regulatory phrase, "affecting the safety or effectiveness of the device," as being circumscribed by another regulatory

phrase, "intended . . . conditions of use." *See* 243 F.3d at 15.

No similar question was presented here. Here, the underlying crime was one of manipulating doctors into making false certifications so Damon could receive unwarranted Medicare payments. There is no material question about ambiguity in the underlying legal requirements and no germane question about the meaning of the law. There was also no issue of lack of fair notice of what the law requires, a concern underlying the *Prigmore/Rowe* line of cases. A reasonable person knows it is wrong to trick others into doing something wrong which one does not do directly oneself, especially in order to obtain personal gain. The *Prigmore* doctrine has no application given the crimes charged and the facts involved. Because the natur of the crime charged made the reasonable interpretation doctrine irrelevant, the jury instruction issue disappears.

C. Failure of District Court to Respond To All of Thurston's Requested Instructions

Thurston argues that the district court violated Rule 30, Fed. R. Crim. P., which provides that

> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.
>
> (b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

Thurston is correct: the district court failed to inform the parties of how it intended to rule on each of the requested instructions before closing arguments, as required by the rule.

A description of the interactions of court and counsel sets the stage. Each side submitted extensive requests for instructions, and there were disagreements.[14] The court did resolve the most serious disputes over some of the instructions (for instance, on the reasonable interpretation/*Prigmore* question) and told counsel these rulings before closing argument. The court did not, though, review all of the requests. Thurston's counsel did not object to this silence before giving his closing.

Defense counsel did raise an issue after closing, and before the jury was instructed, that he wanted to put on record his specific objections to the government's requests. He did not say he had been prejudiced in any way by the court's failure to rule on the requested instructions before he gave his closing. The court replied that it would neither rule on nor hear argument on the proposed instructions.

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[14] As examples of disagreements, Thurston gives the following. The government filed objections to Thurston's requested instructions concerning character evidence and reputation (No. 7); Thurston's status as vice-president (No. 10); the definition of "knowingly" (No. 16); the definition of "willfully" (No. 17); proof of specific intent to participate (No. 18); the definition of "overt act" (No. 21); the good-faith defense (No. 22); and Thurston's reasonable interpretation of Medicare laws (No. 23). Counsel for Thurston objected to three of the government's requested instructions, each of which concerned an element of the offense: conspiracy (No. 18); unlawful objectives (No. 19); and overt acts (No. 22).

Rather, the court stated its understanding that the appropriate time to object was at the end of the instructions. Nonetheless, it did hear argument on the government's Request No. 8 (the compelled witness rule), and declined to give the instruction. It also heard argument on the government's proposed instructions No. 18 (conspiracy); No. 19 (unlawful objectives); and No. 22 (overt act). The only proposed defense instruction called to the court's attention was No. 24, on missing witnesses.

The district court did not, as Rule 30 requires, tell counsel before closing argument its disposition of all of the requested instructions. But counsel for Thurston had an obligation to bring this to the court's attention before the closing and did not do so.

Without addressing the issue of whether Thurston has thus forfeited the Rule 30 argument, we choose to simply evaluate whether defense counsel's closing argument was adversely affected. *See United States v. Owens,* 167 F.3d 739, 753 (1st Cir. 1999). It was not. One telling indicium that there was no prejudice is that trial counsel did not ever say to the court he would be prejudiced if he had to proceed with his closing without knowing the court's disposition of the remaining requested instructions.

An even more telling indicium of lack of prejudice is that Thurston's appellate counsel has been unable to identify any specific areas of prejudice occasioned by the trial court's lapse. While in theory such a lapse could cause prejudice, the most that is argued here is that there was "no detailed reference to important legal concepts regarding criminal conspiracy and the state of mind by which Thurston would be judged." Appellate counsel does not identify those "important legal concepts," and we see none.

As to Thurston's state of mind, the trial judge did instruct on the government's burden to show Thurston had a specific intent to participate in the conspiracy and to defraud the United States. The court instructed the jury to consider Thurston individually to determine if he willfully joined the conspiracy. The court, in turn, defined "willfully." The court also explicitly rejected Thurston's reasonable interpretation instruction, and it instructed on good faith. These circumstances belie any claim of prejudice and Thurston's claim fails.

D. Motion for New Trial Based on Dismissal of Apolipoprotein Charge

Thurston and his co-defendants were originally charged with conspiracy to commit fraud as to both the ferritin and the apolipoprotein tests. At the close of the government's case the court granted Thurston's motion for judgment of acquittal on the apolipoprotein test, struck those references from the indictment, and instructed the jury that this issue was no longer before it. The government did not thereafter refer to this issue.

Thurston now argues that the court should have granted Thurston a new trial after the jury returned because the apolipoprotein evidence irretrievably tainted the trial. The government rejoins that counsel should have raised the issue sooner.

Again, we bypass the issue of forfeiture and reject the argument that dismissal of the apolipoprotein charges tainted the proceedings. Thurston's argument that none of this evidence would have been admitted if the ferritin charges were tried alone is based on an unlikely premise. Where the evidence admitted as to a dismissed count

would have been admissible as to a remaining count, the defendant has not suffered prejudice. *United States v. Rooney*, 37 F.3d 847, 855-56 (2d Cir. 1994) (collecting cases); *see United States v. Weiner*, 3 F.3d 17, 22 (1st Cir. 1993) (jury properly considered evidence relating to counts dismissed prior to verdict, since evidence was relevant to remaining counts).

The government would have introduced such evidence in any event as relevant to rebut central defense themes that, because Damon had such a decentralized decision-making structure, Thurston was not involved in key decisions. The apolipoprotein evidence contradicted Thurston's claims about the extent and consequences of Damon's decentralized approach to the make-up, pricing, and marketing of its panels.

There was little risk of prejudice for other reasons. The government did not mention the apolipoprotein evidence in its closing, and exhibits pertaining only to apolipoprotein were removed before the documents were submitted to the jury. Further, most of the testimony and documentary evidence in the first half of the case, before the court ruled on the Rule 29 motion, dealt with ferritin. These factors further minimized the likelihood of any taint.

Thurston's conviction is affirmed.

IV. Sentencing Appeals

A. Thurston's Appeal from Loss Calculation

Much of Thurston's guidelines sentence range (sixty-three to seventy-eight months) was driven by the loss

calculation. Both the PSR and the government recommended an intended loss figure of more than five million dollars but less than ten million dollars. This resulted in a fourteen-level increase in the base offense level.

Thurston, not surprisingly, targets this loss calculation. He makes two arguments. The first is that the government was precluded by a comment to U.S.S.G. § 2F1.1 from ever relying on intended loss unless the government first established what the actual loss was and then established that the intended loss was greater. This is a pure issue of guidelines interpretation, which we review de novo. *See United States v. Gonzalez-Alvarez*, 277 F.3d 73, 77 (1st Cir. 2002). The second argument is that the court's conclusion had insufficient factual support for a number of reasons, a contention reviewed for clear error.

The guidelines interpretation argument turns on a comment which provides:

> Consistent with the provisions of § 2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.

U.S.S.G. § 2F1.1, cmt. n. 7 (*Fraud and Deceit*).

Thurston argues that because the government did not show actual loss, it cannot turn to intended loss. The argument is simply wrong as a matter of the wording of the comment. The comment directs the use of an intended loss figure when it is greater than the actual loss figure; the comment does not restrict the sentencing court's ability to rely on intended loss when there is no actual loss calculation available. Defendant's reading also makes little sense: it may be easier as a matter of proof to show

intended loss than actual loss. Conspirators are held accountable for the loss they intend to commit. Finally, it is obvious on these facts that the intended loss was greater than the actual loss – some doctors quit using Damon when, to their disgust, they realized what the scheme was.

Thurston next mounts a series of fact-based attacks on the intended loss figure of more than five million dollars. That figure is supported by the capital expenditure requests each of the labs prepared to obtain funding to buy the equipment needed to perform the increased ferritin testing the labs anticipated. Each CER included a financial analysis, one component of which was the estimated new revenue from bundling the tests. Thus, the intended loss calculation was based on the conspirators' own financial calculations.

Thurston argues the CERs, being mere financial projections, are not an adequate basis for an intended loss figure; that the CERs were based on an assumed best case scenario in which no physician who ordered Labscans would decline to get ferritin tests; that, in any event, not all physicians who ordered the bundled test were tricked into doing so; that the conspiracy was not proven to last five years; that the conspiracy ended before five years had elapsed for several labs, given the different dates on which the labs bundled the tests; and that later, only one lab reported to Thurston.

A number of these are quickly dispatched. The jury verdict of guilt disposes of the question of the length of the conspiracy. Thurston's promotion out of management of three of the labs is irrelevant since he earlier conspired to produce losses intended to go on for years.

Thurston also argues the intended loss had to be reduced under U.S.S.G. § 2X1.1(b)(2) because the government's proof did not establish that the conspirators had "completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense." *Id.* There is no merit to the argument. There was successful completion of the offense: the tests were bundled and doctors were misled into ordering unnecessary ferritin tests. The complaints from customers about Damon's practices were confirmation the scheme had worked.

The closer question is the degree of precision the government must reach in showing intended loss. It is true that the CERs set forth best case scenarios which assumed all doctors would order the bundled test without culling out the ferritin test. If the CERs stood alone, defendant would have a better argument. But they are supplemented by the fact that Damon made it extremely difficult for doctors to cull out the ferritin and order the Labscan without a ferritin test.

Further, the conspirators tried to hide from doctors the fact that there was a significant cost to Medicare associated with the bundling. The conspirators were maximizing the probability that all doctors would accept the bundling, without culling and without protest. The fact that the conspirators were not entirely successful in fooling all doctors does not lessen their intent.

We have noted before that intended loss does not have to be determined with precision; the court needs only to make a reasonable estimate in light of the available information. *United States v. Blastos*, 258 F.3d 25, 30 (1st Cir. 2001). There was good evidence of intent and some

"prospect of success" for the fraud to reap over five million dollars, and that is all that the case law requires. *United States v. Orlando-Figueroa*, 229 F.3d 33, 48 (1st Cir. 2000). The best case CER projection was a loss to Medicare over the charged five-year life of the conspiracy of $5,800,230. It was reasonable for the district court to estimate that the intended loss exceeded five million dollars, even allowing for the one to two percent normal order rate for ferritin tests. The government met its burden and Thurston offered little in rebuttal except his protestations of innocence. There was no clear error.

B. Government's Sentencing Appeal

Given an intended loss of five million dollars, Thurston's crime led to the statutory maximum sentence of five years. The district court departed downward from the Guidelines range by sixteen levels, however, sentencing Thurston to three months' imprisonment to be followed by twenty-four months of supervised release. The court imposed no fine and recommended that the term of imprisonment be served in a halfway house.

1. Appeal from Grant of Downward Departures

The government argues that each of the stated grounds for downward departure was in error.[15] First, it

[15] The court stated:

> [I]n granting the motion for downward departure, I'm basing it on two grounds.
>
> First, the downward departure is justified because of the defendant Thurston's record of charitable work and

(Continued on following page)

contends that the district court was forbidden to depart downward based on a disparity between Thurston's sentence and the sentence of the company president, a cooperating co-conspirator who pled guilty. Next, it argues that departure for good deeds is discouraged and that the facts provide no basis to warrant a finding that Thurston's good deeds are so exceptional as to make such a departure appropriate.

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community service[, which] is unique, extensive and extraordinary. I think the record should reflect that in over fourteen years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church.

And the second ground is that which is set out in the United States Sentencing Commission Guidelines Manual under Chapter 1, Part A, Section 3, which is entitled ... "The Basic Approach, paren, policy statement, closed paren," setting forth the rationale of the guidelines, it's cited here that Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

We have a situation here where coconspirator Isola, the president of Damon and the architect, at least the prime architect of this conspiracy, received a sentence of three years' probation, and it is, in my judgment, a violation of the fundamental purpose of the Sentencing Commission Guidelines to impose a sentence which is not at least somewhat similar to that incurred by a coconspirator who was more involved in the conspiracy t[h]an this defendant.

a. Standard of Review: Effect of the PROTECT Act

On April 30, 2003, certain provisions of a new statute affecting the courts of appeals' review of sentencing provisions became effective. The PROTECT Act changes the applicable standard of review on certain issues in appeals from departures from the sentencing guidelines.

Section 401 of the PROTECT Act amends 18 U.S.C. § 3742(e), which now reads:

> (e) **Consideration.** – Upon review of the record, the court of appeals shall determine whether the sentence –
>
> . . . .
>
> (3) is outside the applicable guideline range, and
>
> (A) the district court failed to provide the written statement of reasons required by section 3553(c);
>
> (B) the sentence departs from the applicable guideline range based on a factor that –
>
> (i) does not advance the objectives set forth in section 3553(a)(2); or
>
> (ii) is not authorized under section 3553(b); or
>
> (iii) is not justified by the facts of this case; or
>
> (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a)

> of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c);. . . .
>
> . . . .
>
> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, *except with respect to determinations under subsection (3)(A) or (3)(B)*, shall give due deference to the district court's application of the guidelines to the facts. *With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.*

(emphasis added).

This changed the prior law. Under *Koon v. United States*, 518 U.S. 81 (1996), the appellate courts were not to review a departure decision de novo, but were to ask whether the sentencing court abused its discretion.[16] *Id.* at 91, 96-100. Where a district court grants a departure, we have, before the PROTECT Act, engaged in a three-part review: "(1) we determine whether the stated ground for

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[16] Before *Koon* was decided in 1996, the rule in this circuit was that we would review de novo whether, "taking the reasons for departure stated by the district court at face value, those reasons will as a matter of law justify abandonment of the guidelines." *United States v. Wogan*, 938 F.2d 1446, 1447 (1st Cir. 1991). We point this out because Thurston's fraudulent conduct took place before *Koon* and when this court used a de novo standard of review, as is now mandated by the PROTECT Act.

departure is theoretically permissible under the guidelines; (2) if so, we examine the record to assess whether there is adequate factual support; and (3) we determine the appropriateness of the degree of departure." *United States v. Bogdan*, 302 F.3d 12, 16 (1st Cir. 2002). Whether a stated ground for departure was theoretically permissible (part (1)) was a question of law reviewed de novo. *United States v. Bradstreet*, 207 F.3d 76, 81 (1st Cir. 2000); *cf. United States v. Diaz*, 285 F.3d 92, 98-99 (1st Cir. 2002) ("We review de novo whether the district court utilized a proper basis for [an upward] departure."). Under *Koon*, we then reviewed the remaining two parts for abuse of discretion. *See Koon*, 518 U.S. 96-100; *United States v. Lujan*, 324 F.3d 27, 31 n.5 (1st Cir. 2003); *United States v. Martin*, 221 F.3d 55 (1st Cir. 2000).

The courts of appeals are now charged with de novo review of the second issue: whether the facts are exceptional (or outside the heartland), thus warranting consideration of a departure. Congress requires the courts of appeals to consider whether a sentence that departs from the applicable guideline range is based on a factor that:

> (i) does not advance the objectives set forth in section 3553(a)(2); or
>
> (ii) is not authorized under section 3553(b); or
>
> (iii) is not justified by the facts of the case[.]

18 U.S.C. § 3742(e)(3)(B).

Thurston argues that the PROTECT Act should not be interpreted to apply to this case and that, if it did apply, it would be retroactive and invalid. He makes two statutory intent arguments: (1) that the internal structure of the statute means it should not be applied to cases already

pending on appeal; and (2) that the presumption against retroactivity should apply.

First, Thurston argues that Congress meant application of the de novo review provisions in the PROTECT Act to be deferred until appeals arise from sentences entered after the Act became effective. This is evident, Thurston says, since the Act imposed a new requirement for the district judge to give a *written* statement of reasons. From this, Thurston argues, all provisions of the Act were meant to apply only to post-Act sentencing. The argument is plausible, but we are unpersuaded. Even before the PROTECT Act, a trial court was required to give some reasons, though not necessarily in writing, for a downward departure. *See* 18 U.S.C. § 3553(c) (2000) (pre-PROTECT Act version); *United States v. Sclamo*, 997 F.2d 970, 973 (1st Cir. 1993) (discussing discouraged ground for departure); *United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994) (same). A requirement that this statement of reasons be written, rather than oral, has no particular connection to the appellate standard of review.

Although the Act does not expressly say that its de novo review provision applies to pending appeals, it does give an effective date of April 30, 2003. The effective date of a statute does not by itself establish that it has any application to conduct that occurred at an earlier date. *See INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994)). Still, we agree with the Eighth Circuit that the new statute applies to appeals pending as of the effective date of the statute. *See United States v. Aguilar-Lopez*, 329 F.3d 960, 962-63 (8th Cir. 2003). Subject to constitutionally-based retroactivity concerns, it is certainly within Congress's power to change a standard of review. *See, e.g., Hines v. Sec'y of*

Dep't of Health & Human Servs., 940 F.2d 1518, 1523 (Fed. Cir. 1991); *Consumers Union of U.S. v. FTC*, 801 F.2d 417 (D.C. Cir. 1986); *cf. Bierce v. Waterhouse*, 219 U.S. 320, 336-37 (1911). Much of the conduct regulated by this part of the PROTECT Act is that of the courts of appeals (and indirectly, the district courts now under closer scrutiny), and that involves conduct dating from April 30, 2003 forward.

Thurston's fall-back argument is that applying a changed standard of review to a case already on appeal would have an impermissible effect on him under the Supreme Court's retroactivity jurisprudence. *See Landgraf*, 511 U.S. at 264. Not so. The change of a standard of appellate review is one in procedure for the courts; procedural changes that do not affect substantial rights are not usually considered retroactive. This legislation is little different than the Supreme Court's changing the standard of review by directing the courts of appeals to decide ultimate Fourth Amendment questions by de novo review. *See Ornelas v. United States*, 517 U.S. 690, 697 (1996). When the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation that must be applied "retroactively" to all criminal cases on direct review. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 95 (1993) (citing *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)). Changing the appellate standard of review, as done here, could upset no legitimate reliance interest by a defendant,[17] could not have induced

[17] In Thurston's case, there could be no reliance interest in any event, since this court used a de novo standard of review at the time he committed the crime.

alteration of the behavior that led to the crime, and could not have upset settled expectations. We see no unfairness to defendants in Congress's requiring a closer look by appellate courts at whether a district court committed an error in deciding that the guidelines permitted a departure. It is the substance of the sentencing rules, both Guidelines and statutory, that impacts defendants.

Thurston makes a cursory argument that the PROTECT Act presents serious constitutional separation-of-powers questions. At the request of the Senate, the Chief Justice, expressing the views of the U.S. Judicial Conference, did advise the Senate of the Conference's opposition to portions of the bill, including alteration of the standard of review. *See* Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy (undated), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/Rehnquist_letter.pdf. The U.S. Sentencing Commission requested that Congress not act until the Commission had the opportunity to analyze data and study the matter. *See* Letter from Judge Diana Murphy, Chair of the U.S. Sentencing Commission, et al. to Senators Orrin Hatch and Patrick Leahy (April 2, 2003), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/departures/$FILE/stcg_comm_current.pdf. But judicial opposition to legislation on policy grounds is one thing, and unconstitutionality of the legislation is another. No real theory of unconstitutionality has been presented by this appeal, and so the issue is waived. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990).

b. Application of De Novo Standard of Review

i. Disparity With Co-Defendant

The district court felt there was an unfair disparity between a five-year sentence of imprisonment for Thurston and the three-year probation sentence for co-conspirator Isola. It viewed Isola as "the architect, at least the prime architect of this conspiracy." Apparently the district court felt that Isola, Thurston's superior, was the guiltier of the two, and that this fact overshadowed other differences between their cases. Isola pled nolo contendere to willful blindness about the apolipoprotein conspiracy.

As the law of this circuit makes clear, basing the departure on grounds of disparity in sentence alone between Thurston and Isola was beyond the district court's authority. *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991); *see also United States v. Romolo,* 937 F.2d 20, 25 n.5 (1st Cir. 1991). Sidestepping circuit precedent, the district court referred to a statute that requires a sentencing court to consider not only the Commission's Sentencing Guidelines and policy statements, but also "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This provision was unchanged by the PROTECT Act.

Yet the same statute also requires that the court "shall impose a sentence of the kind, and within the range [of the pertinent Guidelines], unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b)(1). That is why, since as early as 1991, this court has interpreted the statute to preclude sentencing judges

from departing downward based on "a perceived need to equalize sentencing outcomes for similarly situated co-defendants, *without more.*" *Wogan*, 938 F.2d at 1448 (emphasis added).

The "more" that is needed refers to circumstances not adequately considered by the Commission, and none have been shown here with regard to disparity. In the pre-Guidelines era, the district court's attempt to avoid perceived unfairness would have had greater weight. The Guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible.

ii. Good Works

The second ground, based on Thurston's good works, poses the most difficult issue in the case. We have found disparity alone an impermissible ground; it is possible the trial court would not have granted so extensive a departure based on good works alone. It may also be that if the court had granted a modest departure on the second ground, the government would not have appealed. But the trial court did not differentiate and the government on appeal argues that any departure at all based on good works (like the departure for disparity) was contrary to law.

The Sentencing Guidelines discourage downward departures from the normal sentencing range based on good works – that is, civic, charitable, or public service. U.S.S.G. § 5H1.11. Such departures are permitted only

when the good works are exceptional.[18] *See United States v. Pereira,* 272 F.3d 76, 80 (1st Cir. 2001). The district court based its finding that Thurston's good works were exceptional on Thurston's "record of charitable work and community service[, which is] unique, extensive and extraordinary." The court continued, "I think the record should reflect that in over fourteen years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially . . . to his church." Thurston is a member of the Church of Latter Day Saints, tithes ten percent of his income (as his church encourages him to do), and devotes hours every week to unpaid service with the church in a variety of positions. Letters from his fellow congregants characterize him as a man of principle and impeccable character[19] – characterizations undermined, of course, by the jury's finding of guilt. In any event, it is good works, objectively measured, and not good character that is at issue.

In addition, Thurston has taken family members and others into his home and has been helpful to his

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[18] Good works may also be considered in setting a sentence within the Guidelines range or in setting certain conditions. This does Thurston no good, however, since the applicable Guidelines range is sixty-three to seventy-eight months, all above the statutory maximum of sixty months.

[19] During the trial, numerous witnesses for both sides testified to Thurston's reputation for honesty and integrity. During the sentencing phase, many of Thurston's friends and family members explicitly or implicitly said they thought the jury verdict was incorrect.

Good character is covered by the aberrant behavior guidelines, and here is no claim on appeal that Thurston was entitled to a departure on those grounds.

neighbors. For example, the parents of a woman undergoing rehabilitation at a local medical center stayed at Thurston's home for several weeks. On another occasion, Thurston and his family laid sod for an infirm neighbor. Save for his crime, Thurston appears to have lived a creditworthy life.

The issue then becomes, as we engage in de novo review, the point of reference by which to determine whether Thurston's good works provide a basis for a departure. Earlier, under *Koon*, 518 U.S. 81, the very sensible rationale was that the district courts, which saw far more sentencing cases than the courts of appeals, were better positioned to determine what was exceptional, and appellate courts owed deference to that more expert determination. *See id.* at 96-100. The PROTECT Act has abrogated that deference. There are many policy arguments in favor of deference to the district court, which were presented to Congress by the Judicial Conference of the United States. But Congress chose to decide the balance differently, expressing concern that the departure rate for certain crimes and within certain districts threatened to undermine the Guidelines regime. *See, e.g.*, H.R. Rep. No. 108-66, at 58-59, *available at* http://thomas.loc.gov/cgi-bin/cpquery/T? & report=hr066 & dbname=cp108&; 149 Cong. Rec. H3059, H3066 (daily ed. April 10, 2003) (statement of Rep. Sensenbrenner).

In reviewing de novo whether any departure is permissible, the PROTECT Act and the case law require courts of appeals to consider three sources: other decisions under the Guidelines; the Commission's relevant Guidelines and statements; and the congressional purposes behind sentencing. Even before the PROTECT Act, the question of whether a discouraged factor was present in an

exceptional way was determined in large part by comparison with other Guidelines cases. *See Pereira*, 272 F.3d at 80 (citing *Koon*, 518 U.S. at 98). Such other cases are not limited to cases involving convictions for the same offense. *See United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994). Second, appellate courts are also to consider policy statements and official commentary by the Sentencing Commission. 18 U.S.C. § 3553(b). Third, Section 401 of the PROTECT Act instructs courts of appeals to consider whether a departure is consistent with the purposes of sentencing stated in 18 U.S.C. § 3553(a)(2) – that is, retribution, deterrence, incapacitation, and rehabilitation.

As to comparisons with other reported cases, each side has some circuit authority in support of its position; the government's cases are a closer fit. The government cites *United States v. Morken*, 133 F.3d 628, 629-30 (8th Cir. 1998) (divided court reverses a downward departure because good works are not exceptional for someone of defendant's income and preeminence in a small town); *United States v. Kolbach*, 38 F.3d 832, 838-39 (6th Cir. 1994) (vacating a good works departure because "it is usual and ordinary, in the prosecution of similar white collar crimes involving high-ranking corporate executives . . . to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts"); and *United States v. Haverstat*, 22 F.3d 790, 795-96 (8th Cir. 1994) (vacating a departure for good works where the defendant's charitable and volunteer activities did not make him an atypical defendant in an antitrust price-fixing case).

In *United States v. Bogdan*, 284 F.3d 324 (1st Cir. 2002), this court found no basis for a downward departure for a caring and generous father who made efforts to

improve his relationship with his ex-wife and supported her financially and who was introspective and remorseful about his crime. *Id.* at 329-30. When the district court again granted a downward departure because it thought the sentence "unconscionable," this court again reversed. *United States v. Bogdan,* 302 F.3d 12, 16-17 (1st Cir. 2002).

In turn, Thurston relies on several circuit decisions affirming good works downward departures. These cases are less persuasive than those cited by the government, since the circuit courts merely hold that there was no abuse of discretion and since the facts are less analogous. *See United States v. Serafini,* 233 F.3d 758, 775-76 (3d Cir. 2000) (affirming a downward departure based on exceptional charitable works in light of the defendant's meager resources); *United States v. Woods,* 159 F.3d 1132, 1136-37 (8th Cir. 1998) (in a bankruptcy fraud case involving a defendant who transformed the lives of two girls and cared for an elderly friend, a one-level downward departure was not an abuse of discretion); *United States v. Rioux,* 97 F.3d 648, 662-63 (2d Cir. 1996) (no abuse of discretion to depart downward based on a combination of medical condition and civic good deeds). We would find the expertise reflected in the decisions of the district courts to be useful as well in determining whether particular good works are exceptional. But the parties have not cited any such cases.

As the government's cases indicate, corporate executives are usually better situated to make large financial contributions and are often expected, by virtue of their positions, to engage in civic and charitable activities. The ability to make large contributions should not keep a defendant out of jail. *See United States v. McHan,* 920 F.2d 244, 248 (4th Cir. 1990). And those whose place in life does

not give them similar opportunities should not be disadvantaged. *See* U.S.S.G. § 5H1.10.

For similar reasons, we would be reluctant to find a defendant's good works exceptional *solely* on the basis of actions that were required or encouraged as a condition of membership in a religious institution. Such a result -- which would seemingly entitle all members in good standing to a downward departure – could undercut the principle that religion (like socio-economic status) is a forbidden basis for departure. *See* U.S.S.G. § 5H1.10. On the other hand, good works should not have less weight because a defendant was motivated by religious belief. Thurston should not be disadvantaged by his church involvement. It would, in any event, do a disservice to Thurston to categorize him entirely in terms of his economic or religious status. His good works predated his executive status and continued over time; they exceeded the bare requirements for church membership; and they involved costs to him in terms of time and effort.

In sum, the comparison to other case law is not dispositive and is, in any event, only one part of the analysis. We move on to the Guidelines and to the purposes of sentencing.

Two salient principles emerge from the Guidelines: the goal of parity between white collar and other criminal defendants and the goal of discouraging departures based on good works. Congress and the Sentencing Commission were clear that under the pre-Guidelines regime, sentences for white collar crimes were too

lenient.[20] The Sentencing Commission intended to "equalize punishments for 'white collar' and 'blue collar' crime." *United States v. Rivera*, 994 F.2d 942, 955 (1st Cir. 1993) (Breyer, J.).

Viewing the departure in terms of the purposes of sentencing also militates against the departure. Thurston was convicted of a serious crime, a massive fraud at public expense involving deceit, trickery, and sophistication. The federal government spent approximately $249 billion on Medicare last year. One group has estimated that about three percent of the $1.4 trillion the country spent on health care in 2001 was lost to fraud.[21] "A Sick Business,"

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[20] *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 Loy. U. Chi. L.J. 359, 372-76 (2003) (discussing the Sentencing Commission's concern that white-collar crimes have been "grossly under-sentenced"); *id.* at 396-401 (collecting data on the under-sentencing of white-collar crimes and arguing that the prevalence of downward departures in white collar cases threatens to undermine the integrity of the Sentencing Guidelines); *see also* Testimony of Sentencing Commissioner Stephen Breyer Before the Senate Committee on the Judiciary, Oct. 22, 1987, *reproduced in* 146 PLI/Crim 811, 824 (1987) ("[T]he Commission considers present sentencing practices, in which white collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair."); 28 U.S.C. § 994(m) (2000) ("The [Sentencing] Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."). The recent enactment of enhanced penalties for many white collar crimes only underscores Congress's disinclination towards leniency for white collar criminals. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801-1107, 116 Stat. 745, 800-10.

[21] For other circuit court cases involving Medicare and Medicaid fraud, *see United States v. Baxtonbrown-Smith*, 278 F.3d 1348 (D.C. Cir. 2002) (fraud exceeding two million dollars); *United States v. Liss*, 265 F.3d 1220 (11th Cir. 2001) (kickback scheme for referrals); *United States*

(Continued on following page)

The Economist, June 28, 2003, at 64 (citing data from National Health Care Anti-Fraud Association); *see* National Health Care Anti-Fraud Association, Health Care Fraud, at p. 2, *available at* http://www.nhcaa.org/pdf/all_about_hcf.pdf (n.d.). The retribution and deterrent interests in sentencing would be significantly undercut by permitting a good works departure on this record.

"Good works" do not stand alone. They must be evaluated in the context of the crime and the purposes of sentencing. Health care fraud, a form of white collar fraud, is a serious national problem, affecting the financial integrity of programs meant to aid tens of millions of people in need of health care. Every dollar lost to fraud is a dollar that could have provided medical care to the elderly or the disabled. By definition, Medicare fraud will most likely be white collar fraud, committed by educated people with responsible jobs. Thurston's executive position at Damon, which gave him the resources to undertake many of his charitable works, also enabled him to perform the crime. Were it not for the statutory maximum, he would, under the Guidelines, have been sentenced to imprisonment for more than five years. A five-year term of imprisonment in light of the nature of the crime reflects the seriousness of the offense, the need for congruity with "blue collar" crime, and the need to deter other executives from similar law-breaking. Thurston's admirable good

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v. Regueiro, 240 F.3d 1321 (11th Cir. 2001) (fraud exceeding fifteen million dollars); *United States v. McClendon,* 195 F.3d 598 (11th Cir. 1999) (fraud exceeding three million dollars); and *United States v. Polin,* 194 F.3d 863 (7th Cir. 1999) (Medicare kickback scheme).

works simply are not so exceptional, in context, as to provide a basis to depart.

The government's argument that Thurston's conduct warranted an upward adjustment for obstruction of justice based on perjury at trial need not be resolved, given our disposition of the other issues. The statute caps his period of incarceration at sixty months. It is noteworthy, though, that Thurston's testimony on key matters of fact was contradicted by multiple witnesses.

c. Fine

The government argues that the sentencing judge erred by failing to impose a fine on Thurston in accordance with the Guidelines. Thurston argued, and the district court accepted, that he should not receive a fine because that would create an unacceptable disparity between his sentence and that of co-defendant Isola. Sentence disparity is an unacceptable basis for refusing to impose a fine and is plain error for the reasons discussed earlier.

Thurston contends that the government has forfeited its argument that a fine must be imposed by failing to object *after* the judge ruled. The government earlier took the position that a fine must be imposed and also argued that the court could not refuse to impose a fine on the basis of disparity – the only argument Thurston presented. In these circumstances, the issue was not forfeited. *See Gallant,* 306 F.3d at 1187-88 (holding that a sentencing issue was not forfeited as a result of counsel's failure to object after the court's ruling); *cf. United States v. Meserve,* 271 F.3d 314, 325 (1st Cir. 2001) (motion to strike unnecessary to preserve evidentiary issue where party objected prior to trial court's ruling). Even were this an instance of

forfeiture, the district court committed plain error in its rationale.

Before this court, Thurston attempts to defend the decision not to impose a fine on the basis that the statutory definition of his crime, which provides that a fine *may* be assigned, trumps the Guidelines, which provide that a fine *must* be assigned barring special circumstances. The crime of which Thurston was convicted, 18 U.S.C. § 371, provides for a prison term, a fine, or both. By contrast, U.S.S.G. § 5E1.2(a) says, "The court *shall* impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." (emphasis added). The defendant did not establish, or even seek to establish, inability to pay. The sentencing judge made no finding, implicit or explicit, that Thurston could not pay. The PSR estimated that Thurston had a net worth of over $1.5 million, and the minimum fine under the Guidelines was $12,500.

Because the sentence fixed by U.S.S.G. § 5E1.2(a) is within the range contemplated by 18 U.S.C. § 371, the Guideline is not trumped by the statute. *See United States v. Page,* 84 F.3d 38, 43 (1st Cir. 1996) ("There is no reason why the Guidelines may not make their own classifications within the statutes, and hence definitions which the courts must observe, so long as these are not internally inconsistent or in violation of the Constitution or a federal statute."). Here there is no inconsistency and the district court was required to impose a fine.

V. Conclusion

Thurston's conviction is *affirmed.* Thurston's sentence is *vacated;* the downward departure based on good works

and purported disparity is *reversed;* and the order that no fine be imposed is *reversed.* The case is *remanded* for imposition of the statutory maximum sentence of sixty months in prison and for imposition of an appropriate fine. So ordered.

United States Court of Appeals
For the First Circuit

Nos. 02-1966, 02-1967

UNITED STATES OF AMERICA,

Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,

Defendant, Appellee/Cross-Appellant.

JUDGMENT

Entered: August 4, 2003

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The conviction of William Thurston is affirmed. The sentence of William Thurston is vacated; the downward departure based on good works and purported disparity is reversed; and the order that no fine be imposed is reversed. The case is remanded for imposition of the statutory maximum sentence of sixty (60) months in prison and for imposition of an appropriate fine.

By The Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan,
Clerk

United States District Court

District of Massachusetts

UNITED STATES OF AMERICA

v.

WILLIAM THURSTON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1: CR 98-10026-03-EFH

Joseph Russoniello, Esquire
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s): _____

☐ pleaded nolo contendere to counts(s)_____ which was accepted by the court.

☒ was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 371	Conspiracy to Defraud the United States	08-00-93	1

☐ See continuation page

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on counts(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
000-00-7878

Defendant's Date of Birth:
00-00-45

Defendant's USM No.:
21941-038

Defendant's Residence Address:

10065 S. Memory Book Way
S. Jordan, UT 84095

Defendant's Mailing Address:
Same as above

June 26, 2002
Date of Imposition of Judgment

/s/ Edward F. Harrington
Signature of Judicial Officer

Edward F. Harrington, S.D.J
Name and Title of Judicial Officer

Judge, U.S. District Court
Date

June 26, 2002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 3 months * .

The court makes the following recommendations to the Bureau of Prisons: [T]HAT THE TERM BE SERVED IN A HALFWAY HOUSE AND THAT SAID HALFWAY HOUSE BE LOCATED IN ST. GEORGE, UTAH.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district.

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] ☒ before 2 p.m. on/before September 1, 2002.

☒ as notified by the United States Marshal's Office in Utah.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

[I hav]e executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 24 MONTHS [SPE]CIAL CONDITIONS OF SUPERVISED RELEASE ARE:

THE FIRST THREE MONTHS BE SERVED IN HOME DETENTION.

*

[FUR]THER, THE DEFENDANT SHALL PAY A SPECIAL ASSESSMENT OF $100.00.

☐ See continuation page

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

* ☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated above).

☒ STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR. NO.: 98-10026-EFH
v.	)	
WILLIAM H. THURSTON	)	

STATEMENT OF REASONS

HARRINGTON, S.D.J.

The sentence will be imposed in accordance with the prescribed forms in the Bench Book Sec. 5.02 as follows:

3	months imprisonment with the judicial recommendation that the term be served in a halfway house and with the further judicial recommendation that said halfway house be located in St. George, Utah
____	months/intermittent community confinement
____	months probation
24	months supervised release**
$ ____	fine (including cost of imprisonment/ supervision)
$ ____	restitution
$ 100.00	special assessment

Other provisions of sentence: (community service, forfeiture, etc.)

**Special conditions of supervised release are:

1. Defendant is prohibited from possessing a firearm or other dangerous weapon; and
2. The first three months to be served in home detention.

Defendant Thurston is authorized to voluntarily surrender at either the U.S. Marshal's Office in Utah or at the institution designated by the Bureau of Prisons on or before September 1, 2002.

June 26, 2002
Date

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *

UNITED STATES OF AMERICA

v. **CR. NO.: 98-10026-EFH**

WILLIAM THURSTON

* *

MEMORANDUM AND ORDER OF RECUSAL

October 2, 2003

HARRINGTON, S.D.J.

This Court sentenced Defendant Thurston, a Regional Vice-President of Damon Clinical Testing Laboratories, Inc., to a term of imprisonment of three (3) months, to be followed by a term of supervised release of twenty-four (24) months, the first three (3) months of which were to be served in home detention, after a jury convicted him on a one-count indictment of conspiring to defraud the Medicare program. The fraud charged involved the manipulation of physicians into ordering unnecessary Ferritin blood tests for Medicare beneficiaries, in violation of Title 18, United States Code, Section 371.[1]

[1] Damon was separately indicted for conspiracy to defraud the Medicare program. The company pled guilty and was sentenced to pay a $35,273,141.00 fine and later entered into a civil settlement under which it paid the United States and the state Medicaid programs an additional $83,756,904.00. These payments constituted full restitution.

Charged with Defendant Thurston as co-conspirators were Joseph Isola, President of Damon; Beno Kon, a Vice-President of Finance; and Gerald Cullen, also a Regional Vice-President. The government offered each of the defendants a sentence of a term of probation if he were to plead guilty.

In sentencing Defendant Thurston, this Court departed downward from a sentencing guideline which called for a sentence of sixty-three (63) to seventy-eight (78) months, but the range was trumped by the statutory maximum of sixty (60) months for a violation of Title 18, United States Code, Section 371. The government recommended a term of imprisonment of sixty (60) months. The granting of a downward departure was to correct a disparity between the sentence recommended for Thurston and the sentence of three (3) years' probation given to the company President, Joseph Isola,[2] who had pled *nolo contendere*.[3] In exchange for Isola's plea, the government agreed to dismiss him from the indictment and also agreed not to appeal any sentence the court imposed. Isola's probationary sentence was imposed pursuant to his plea agreement. Thurston was offered a similar deal. A second ground for departure was that the good works Thurston did for his church and community were extraordinary.

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[2] Isola was called to testify in the government's case in chief as to Damon's formal organization and its testing procedures, but his testimony was not unfavorable to Thurston.

[3] Kon was prepared to plead guilty and be sentenced to probation as agreed to by the government, but became ill and died prior to the Rule 11 hearing, at which he was to change his plea to guilty; Cullen went to trial and was acquitted at the close of the government's evidence.

The Court of Appeals affirmed Thurston's conviction, vacated his sentence, reversed the downward departure, and remanded for imposition of the statutory maximum of sixty (60) months in prison and for imposition of an appropriate fine. *United States v. Thurston*, 338 F.3d 50 (1st Cir. 2003).

An essential objective that Congress sought to achieve in enacting the Sentencing Reform Act of 1984 was "uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." United States Sentencing Commission Guidelines Manual, p. 2 (Incorporating guideline amendments effective November 1, 2002).

When the chief architect of the scheme to defraud, President Isola, is offered by the government and receives a term of three (3) years' probation for pleading *nolo contendere* and Vice President Thurston, who is Isola's subordinate, claims that he is innocent and exercises his constitutional "right to a speedy and public trial, by an impartial jury," is to receive a term of imprisonment of five (5) years, the objective of the sentencing guidelines is absolutely annulled. The terms of three (3) years' probation and five (5) years' imprisonment constitute a "wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." The goal of "uniformity in sentencing" has utterly failed to have been achieved. Moreover, it is obvious that this "wide disparity" in sentences was precipitated by Thurston's exercise of a constitutional right. He was offered by the government and would have received a term of probation by the Court if he had been willing to forego a trial by jury and had pled guilty, as had Isola.

The Court recuses itself from this case. It is disinclined to mechanically impose a sentence, previously prescribed by the Court of Appeals,[4] which is clearly contrary to the objective of the sentencing guidelines and which severely punishes a defendant for exercising a constitutional right. The government should be prohibited from inflicting a harsh and punitive penalty on any citizen for the exercise of a fundamental right.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior
District Judge

[4] The newly granted authority given the Court of Appeals under the Protect Act, 18 U.S.C. § 3742(e), as amended, to review *de novo* a departure decision renders the trial judge superfluous and with only a nominal function at disposition. This is so notwithstanding the fact that the trial judge possesses deep understanding of the case based on knowledge acquired from presiding at two complex criminal jury trials.

UNITED STATES COURT OF APPEALS
OR THE FIRST CIRCUIT

Nos. 02-1966, 02-1967

UNITED STATES,
Appellant/Cross-Appellee,

v.

WILLIAM THURSTON,
Appellee/Cross-Appellant.

Before
Lynch, Lipez, and Howard, *Circuit Judges.*
Court Order
Entered: May 29, 2003

Both sides are directed to file simultaneously supplementary briefs not to exceed ten pages per side discussing the application, if any, of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, to the departure issues raised on appeal. The briefs should cover, inter alia, whether and how Section 401(d) of the Act impacts the standard of review and analysis of district court departures from the Sentencing Guidelines. The briefs should be filed no later than June 5, 2003. The attention of counsel is drawn to the requirement of Loc. R. 32 as to the filing of briefs in disk form. The parties should also be prepared to discuss the application of the PROTECT Act at oral argument on June 6, 2003.

By the Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 02-1966
02-1967

UNITED STATES,
Appellant/Cross-Appellee

v.

WILLIAM THURSTON,
Defendant-Appellee/Cross-Appellant

Before
Boudin, *Chief Judge,*
Torruella and Selya, *Circuit Judges,*
Lynch, Lipez and Howard *Circuit Judges.*

ORDER OF COURT

Entered: March 18, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be *denied.*

By The Court:

/s/ RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

Public Law 108-21
108th Congress

An Act

To prevent child abduction and the sexual exploitation of children, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE. – This Act may be cited as the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" or "PROTECT Act".

* * *

SEC. 2. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

* * *

TITLE IV – SENTENCING REFORM

SEC. 401. SENTENCING REFORM.

(a) ENFORCEMENT OF SENTENCING GUIDELINES FOR CHILD ABDUCTION AND SEX OFFENSES. – Section 3553(b) of title 18, United States Code is amended –

(1) by striking "The court" and inserting the following:

"(1) IN GENERAL. – Except as provided in paragraph (2), the court"; and

(2) by adding at the end the following:

"(2) CHILD CRIMES AND SEXUAL OFFENSES. –

"(A) SENTENCING. – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

"(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

"(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that –

"(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

"(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

"(III) should result in a sentence different from that described; or

"(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.".

(b) CONFORMING AMENDMENTS TO GUIDELINES MANUAL. – The Federal Sentencing Guidelines are amended –

(1) in section 5K2.0 –

(A) by striking "Under" and inserting the following:

"(a) DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES. – Under"; and

(B) by adding at the end the following:

"(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES. –

"Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that –

"(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

"(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

"(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground

of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.".

(2) At the end of part K of chapter 5, add the following:

"§ 5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in child crimes and sexual offenses (Policy Statement)

"In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.1.

"An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.4. Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

(3) Section 5K2.20 is amended by striking "A" and inserting "Except where a defendant is convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, a".

(4) Section 5H1.6 is amended by inserting after the first sentence the following: "In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591,

or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.".

(5) Section 5K2.13 is amended by –

(A) striking "or" before "(3)"; and

(B) replacing "public" with "public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code.".

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE. – Section 3553(c) of title 18, United States Code, is amended –

(1) by striking "described." and inserting "described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.";

(2) by inserting ", together with the order of judgment and commitment," after "the court's statement of reasons"; and

(3) by inserting "and to the Sentencing Commission," after "to the Probation System".

(d) REVIEW OF A SENTENCE. –

(1) REVIEW OF DEPARTURES. – Section 3742(e)(3) of title 18, United States Code, is amended to read as follows:

"(3) is outside the applicable guideline range, and

"(A) the district court failed to provide the written statement of reasons required by section 3553(c);

"(B) the sentence departs from the applicable guideline range based on a factor that –

"(i) does not advance the objectives set forth in section 3553(a)(2); or

"(ii) is not authorized under section 3553(b); or

"(iii) is not justified by the facts of the case; or

"(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or".

(2) STANDARD OF REVIEW. – The last paragraph of section 3742(e) of title 18, United States Code, is amended by striking "shall give due deference to the district court's application of the guidelines to the facts" and inserting ", except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the

guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts".

(3) DECISION AND DISPOSITION. –

(A) The first paragraph of section 3742(f) of title 18, United States Code, is amended by striking "the sentence";

(B) Section 3742(f)(1) of title 18, United States Code, is amended by inserting "the sentence" before "was imposed";

(C) Section 3742(f)(2) of title 18, United States Code, is amended to read as follows:

"(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);"; and

(D) Section 3742(f)(3) of title 18, United States Code, is amended by inserting "the sentence" before "is not described".

(e) IMPOSITION OF SENTENCE UPON REMAND. – Section 3742 of title 18, United States Code, is amended by redesignating subsections (g) and (h) as subsections (h) and (i) and by inserting the following after subsection (f):

"(g) SENTENCING UPON REMAND. – A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that –

"(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

"(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

"(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

"(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.".

(f) DEFINITIONS. – Section 3742 of title 18, United States Code, as amended by subsection (e), is further amended by adding at the end the following:

"(j) DEFINITIONS. – For purposes of this section –

"(1) a factor is a 'permissible' ground of departure if it

"(A) advances the objectives set forth in section 3553(a)(2); and

"(B) is authorized under section 3553(b); and

"(C) is justified by the facts of the case; and

"(2) a factor is an 'impermissible' ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).".

(g) REFORM OF GUIDELINES GOVERNING ACCEPTANCE OF RESPONSIBILITY. – Subject to subsection (j), the Guidelines Manual promulgated by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended –

(1) in section 3E1.1(b) –

(A) by inserting "upon motion of the government stating that" immediately before "the defendant has assisted authorities"; and

(B) by striking "taking one or more" and all that follows through and including "additional level" and insert "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the

court to allocate their resources efficiently, decrease the offense level by 1 additional level";

(2) in the Application Notes to the Commentary to section 3E1.1, by amending Application Note 6 –

(A) by striking "one or both of"; and

(B) by adding the following new sentence at the end: "Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing."; and

(3) in the Background to section 3E1.1, by striking "one or more of".

(h) IMPROVED DATA COLLECTION. – Section 994(w) of title 28, United States Code, is amended to read as follows:

"(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include –

"(A) the judgment and commitment order;

"(B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);

"(C) any plea agreement;

"(D) the indictment or other charging document;

"(E) the presentence report; and

"(F) any other information as the Commission finds appropriate.

"(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

"(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

"(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission may assemble or maintain in electronic form that include any information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.".

(i) SENTENCING GUIDELINES AMENDMENTS. – (1) Subject to subsection (j), the Guidelines Manual promulgated by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended as follows:

(A) Application Note 4(b)(i) to section 4B1.5 is amended to read as follows:

"(i) IN GENERAL. – For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on

at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.".

(B) Section 2G2.4(b) is amended by adding at the end the following:

"(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

"(5) If the offense involved –

"(A) at least 10 images, but fewer than 150, increase by 2 levels;

"(B) at least 150 images, but fewer than 300, increase by 3 levels;

"(C) at least 300 images, but fewer than 600, increase by 4 levels; and

"(D) 600 or more images, increase by 5 levels.".

(C) Section 2G2.2(b) is amended by adding at the end the following:

"(6) If the offense involved –

"(A) at least 10 images, but fewer than 150, increase by 2 levels;

"(B) at least 150 images, but fewer than 300, increase by 3 levels;

"(C) at least 300 images, but fewer than 600, increase by 4 levels; and

"(D) 600 or more images, increase by 5 levels.".

(2) The Sentencing Commission shall amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses under

sections 2243(b), 2244(a)(4), and 2244(b) of title 18, United States Code.

(j) CONFORMING AMENDMENTS. –

(1) Upon enactment of this Act, the Sentencing Commission shall forthwith distribute to all courts of the United States and to the United States Probation System the amendments made by subsections (b), (g), and (i) of this section to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. These amendments shall take effect upon the date of enactment of this Act, in accordance with paragraph (5).

(2) On or before May 1, 2005, the Sentencing Commission shall not promulgate any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that is inconsistent with any amendment made by subsection (b) or that adds any new grounds of downward departure to Part K of chapter 5.

(3) With respect to cases covered by the amendments made by subsection (i) of this section, the Sentencing Commission may make further amendments to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission, except that the Commission shall not promulgate any amendments that, with respect to such cases, would result in sentencing ranges that are lower than those that would have applied under such subsection.

(4) At no time may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section.

(5) Section 3553(a) of title 18, United States Code, is amended –

(A) by amending paragraph (4)(A) to read as follows:

"(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

"(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or";

(B) in paragraph (4)(B), by inserting ", taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)" after "Code";

(C) by amending paragraph (5) to read as follows: "(5) any pertinent policy statement –

"(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.".

(k) COMPLIANCE WITH STATUTE. – Section 994(a) of title 28, United States Code, is amended by striking "consistent with all pertinent provisions of this title and title 18, United States Code," and inserting "consistent with all pertinent provisions of any Federal statute".

(l) REPORT BY ATTORNEY GENERAL. –

1) DEFINED TERM. – For purposes of this section, the term "report described in paragraph (3)" means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act –

(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.

(2) REPORT REQUIRED. –

(A) IN GENERAL. – Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

(B) CONTENTS. – The report submitted pursuant to subparagraph (A) shall set forth –

(i) the case;

(ii) the facts involved;

(iii) the identity of the district court judge;

(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and

(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

(C) APPEAL OF THE DEPARTURE. – Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall

submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision.

(3) EFFECTIVE DATE. – Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act, except that such paragraph shall not take effect if not more than 90 days after the date of enactment of this Act the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3).

(m) REFORM OF EXISTING PERMISSIBLE GROUNDS OF DOWNWARD DEPARTURES. – Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall –

(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code –

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced;

(B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0.

(n) COMPOSITION OF SENTENCING COMMISSION. –

(1) IN GENERAL. – Section 991(a) of title 28, United States Code, is amended by striking "At least three" and inserting "Not more than 3".

(2) APPLICABILITY. – The amendment made under paragraph (1) shall not apply to any person who is serving, or who has been nominated to serve, as a member of the Sentencing Commission on the date of enactment of this Act.

* * *

Excerpt of 18 U.S.C.A. § 3553

Showing Changes Made by PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650

(Struck-through text indicates deletion. Underlined text indicates addition.)

§ 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

~~(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or~~

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

~~(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;~~

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – ~~The court~~

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the

purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses. –

(A) Sentencing. – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that –

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24

months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that ~~described.~~ described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * *

Excerpt of 18 U.S.C.A. § 3742

Showing Changes Made by PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650

(Struck-through text indicates deletion. Underlined text indicates addition.)

§ 3742. Review of a sentence.

* * *

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

~~**(3)** is outside of the applicable guideline range, and is unreasonable, having regard for –~~

~~(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and~~

~~(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or~~

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that –

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and ~~shall give due deference to the district court's application of the guidelines to the facts~~, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition. – If the court of appeals determines that ~~the sentence~~ –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for

further sentencing proceedings with such instructions as the court considers appropriate;

~~(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –~~

~~(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;~~

~~(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;~~

(2) the sentence is outside the applicable guideline range and is unreasonable or the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) **Sentencing upon remand.** – A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that –

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

~~(g)~~ (h) **Application to a sentence by a magistrate judge.** – An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

~~(h)~~ (i) **Guideline not expressed as a range.** – For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) **Definitions.** – For purposes of this section –

(1) a factor is a "permissible" ground of departure if it –

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * * * * *		
UNITED STATES of AMERICA,	*	
Plaintiff	*	Criminal No. 98-10026
	*	
v.	*	**Plea and Disposition**
JOSEPH ISOLA,	*	
Defendant	*	
* * * * * * * * * * * * * * * * * *		

Before the Honorable Edward F. Harrington
United States District Court Judge

APPEARANCES:

UNITED STATES ATTORNEY by Susan Winkler, Assistant United States Attorney, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02210, for the Government.

WILLKIE FARR & GALLAGHER, by Benito Romano, Esq. 787 Seventh Avenue, New York, NY 10019-6099, for the Defendant Isola.

John Wall, Esquire, Six Beacon Street, Suite 220, Boston, MA 02108, for co-defendant William Thurston.

COOLEY GODWARD, LLP, by Joseph P. Russoniello, Esq., One Maritime Plaza, San Francisco, CA 94111-3580, for co-defendant Gerald Cullen.

DWYER & COLLORA, by Thomas E. Dwyer, Esquire, 600 Atlantic Avenue, Boston, MA 02110, for co-defendant Beno Kon.

Courtroom 19 – One Courthouse Way
Boston, Massachusetts 02210
July 28, 2000 – 9:05 to 9:41 A.M.

* * *

[2] (Defendant is present in the courtroom.)

THE CLERK: Criminal No. 98-10026, United States versus Joseph Isola.

THE COURT: I'll hear from the government.

MS. WINKLER: Your Honor, we are here today on a change of plea hearing and we have an information and a statement of facts to offer to the court.

THE COURT: All right. Let me see the information.

(Documents were handed to the clerk.)

THE COURT: Is there a plea agreement in this case?

MS. WINKLER: There is not, your Honor. Well, there is an agreement but it is not reduced to writing.

THE COURT: This is an information. What is the status of the indictment? Is that to be dismissed?

MS. WINKLER: Assuming this is accepted today, your Honor, we will be moving to dismiss the indictment as to this defendant.

* * *

[3] THE COURT: All right. The defendant is allowed to proceed by way of information. What do you wish to say?

MR. ROMANO: Yes, your Honor, by way of background, your Honor, we were last before you in April in which we discussed the terms of a plea agreement that have not been reduced to writing, but form the subject of lengthy negotiations between myself on behalf of Mr. Isola and the government, and just to bring the court up-to-date on what the terms are, so that we are proceeding with full knowledge of what we are dealing with here, the government has already indicated it agrees to dismiss the underlying indictment once this matter is disposed of; and the filing of this new information is the instrument to which Mr. Isola intends to enter a plea. Mr. Isola intends to enter a plea of nolo contendere to this information to which the government will lodge an objection on the grounds of office policy.

The government has also agreed not to appeal any sentence that the court would impose and has also agreed that, [4] and we have both agreed, a presentence report is not necessary in this case and we have waived it in the interest – in the public interest.

When we were last before your Honor, we outlined the terms of this plea and your Honor indicated that in light of the unusual circumstances and background of this case, because it has been pending for so long and the conduct that is outlined in the information goes back to 1987, that your Honor thought, indicated in our last conference, that a sentence of probation would be appropriate and there was no indication inn our lobby – at our last conference that a fine would be imposed.

This – Mr. Isola was previously employed by a company that has also pleaded and has paid nearly 120 million dollars, so the government has been compensated

for whatever losses it may have suffered, if any, many, many times over.

On the basis of that conference that we had before your Honor, we are here today for the purpose of carrying out the terms of the plea agreement.

THE COURT: All right.

THE CLERK: Is there a waiver?

THE COURT: The defendant has recited plea negotiations, most of which I am fully aware of and I wish the government to make any response that it wished to with respect to the defendant's representations.

[5] MS. WINKLER: Your Honor, Mr. Romano has correctly outlined the negotiations and the agreements between the parties.

* * *

[6] THE COURT: Let me see the information.

[7] (Clerk handed document to the court.)

THE COURT: I was reviewing the information to determine whether there is just one charge or more than one and it indicates there is only one count.

MR. ROMANO: There is only one count, your Honor.

THE COURT: What is the maximum penalty provided by statute for the offense to which the defendant is offering his plea?

MS. WINKLER: Five years and $250,000 fine, your Honor.

* * *

THE COURT: All right. Take the plea.

THE CLERK: Joseph Isola, the United States Attorney for the District of the Massachusetts charged one count of criminal information charging you with conspiracy to defraud the United States. That is a violation of title 18, United States Code Section 371. What say you to this information as charged, guilty or not guilty?

[8] THE DEFENDANT: Nolo contendere.

THE CLERK: You may be seated.

THE COURT: I will hear from the government and to set forth briefly the evidence which it would have introduced were the case to have gone to trial.

And very briefly.

MS. WINKLER: Your Honor, briefly, the Government would expect to show that Joseph Isola was employed by Damon Clinical Laboratories and as of 1989 he held the position of president, that in that same year the Medicare program announced it was going to reduce fees it paid to clinical laboratories for certain tests and that the defendant was aware of that, that the defendant knew the Medicare program did not pay for clinical laboratory services that were not reasonable and necessary for the diagnosis or treatment of Medicare beneficiaries, that in that summer of 1989, the defendant Joseph Isola and others decided that Damon would add and begin to add an apolipoprotein A and B test to its standard coronary risk panel and that they would do so by charging the Medicare program at least $15 for each test while the physicians would receive it for no less than $5.

The requisition form used by many physicians to order those panels was not changed to allow the physicians a choice; that is, that the panel included apolipoproteins regardless and that the addition of those apolipoproteins to the panel was not [9] announced on the front of the form so physicians may not have known that that was an addition.

That many physicians ordered these panels unaware that Damon was going to charge the Medicare program a higher price than the $5 price the physicians were charged for the same test and that the physicians were unaware that they could receive these panels without the added test. The defendant Joseph Isola subsequently attended budget meetings and received financial reports and knew that Damon after it had added the apolipoproteins to the preliminary risk panels that many of the physician customers began ordering those tests; and as a result, the government would expect to show that the defendant knew that Damon subsequently billed Medicare and the CHAMPUS programs for these apolipoprotein tests and did so willfully blind to the fact that many physicians did not exercise independent medical judgment as to the necessity of these added tests, and that he was further willfully blind to the fact that a significant percentage of those tests were not medically necessary for the Medicare programs for whom they were ordered, and that as a result from 1989 through November of 1992 the defendant Joseph Isola together with others did knowingly and intentionally combine, conspire and agree to defraud the Unite States and its agency, the Health Care Finance Administration in administering the Medicare program by engaging in deceit, craft and trickery, in dealing with physicians, other customers [10] and others in bundling

together a test to cause physicians to order blood tests that were not necessary for the treatment or diagnosis of patients so Damon could bill the Medicare program for unnecessary tests and obtain money from the Medicare program to which it would otherwise not be entitled to have obtained.

Your Honor, if I may also briefly add, the government does object on policy ground to the entry of a nolo plea, but also believes that the statement of facts that was signed by the defendant and has been submitted in support of this information today maintains a legally sufficient basis for the entry of a judgment of violation of conspiracy to defraud the government under 18 USC Section 371 based on willful blindness.

THE COURT: The government has made a statement of facts as to the evidence which it would have introduced were the case to have gone to trial. Do you contest any of those representations or is there anything that you wish to add?

MR. ROMANO: May I speak, your Honor?

THE COURT: Surely.

MR. ROMANO: We don't dispute the factual portions of what the government just presented. The entry of a plea of nolo contendere is intended to acknowledge that while Mr. Isola's position is the practices were legal at the time, it is acknowledgment that while those practices occurred back in 1987, some of those tests may have been unnecessary, some of [11] the tests that were ordered; and we agree that the facts that were presented can provide a legally sufficient basis for the entry of a judgment.

THE COURT: All right. The statement of facts document may also be entered in this case.

* * *

THE COURT: I will accept the nolo contendere plea and [12] enter a finding of guilty thereon.

I find that the plea has been voluntarily and knowledgably offered with an understanding of its possible consequences.

I further find that there is an independent basis in fact for accepting the plea and therefore accept the plea of guilty and order that – strike that. And therefore accept the plea of nolo contendere and order that it be entered in this case.

What's the government's recommendation with regard to sentence?

MS. WINKLER: Your Honor, the government has no recommendation with regard to sentence.

THE COURT: It is my understanding from the recitation of the facts and my memory of various prior proceedings in this matter, that Damon, the corporation for which the defendant worked, has already been adjudged guilty in this matter. Is that correct?

MS. WINKLER: That is correct, your Honor.

THE COURT: And what was the penalty imposed in that case?

MS. WINKLER: As a criminal fine, they paid approximately 35 million dollars or – it was between 33 and 35 million dollars. But it encompassed more conduct than is encompassed by this particular information.

[13] THE COURT: So I heard I think today or my memory is that there was a figure of 120 million.

MS. WINKLER: Yes.

THE COURT: What does that represent?

MS. WINKLER: There was an additional civil settlement in addition to the criminal fine that covered the conduct that was encompassed in the corporate information as well as additional conduct.

THE COURT: And what was that amount of money?

MS. WINKLER: It was around 85 million. It was a total of 119 million dollars between the civil and the criminal resolutions.

THE COURT: So the government is not making any recommendation?

MS. WINKLER: The government is not making a recommendation on sentence.

THE COURT: All right. I will hear from the defendant's counsel.

MR. ROMANO: Your Honor, as we previously described, Mr. Isola has led an exemplary life; and in the course of preparing for this case had we gone to trial, me and my co-counsel have interviewed probably in excess of 200 former employees of Damon who worked under Mr. Isola who over and over and over again what we heard was not just that he was a nice man or a good boss but that he was a person of enormous [14] integrity who would never ever knowingly do something to break the law or

even knowingly engage in unethical conduct. He is a long-time resident of this community, a father of two sons, both of whom are on to college. He is someone who by the government's own acknowledgment, before the events mentioned in, this information, and since the period covered by the original indictment, 1993, there is absolutely no evidence at all that Mr. Isola has done anything but continue to lead an exemplary life.

We were not surprised by the court's reaction when we had our conference before that probation might be the appropriate sentence at the outcome of these proceedings because it is probably a rare occasion when you have someone of Mr. Isola's background and standing who even finds himself in situation like this.

We ask the court to sentence Mr. Isola in accordance with the court's preliminary indications. We ask that the minimum period of probation be imposed and that given the fact that the company that Mr. Isola worked for has more than compensated the government for whatever conceivable losses it could have incurred, that no financial penalty be added to that.

THE COURT: Mr. Isola, is there anything that you wish to say?

THE DEFENDANT: Not at this time, sir.

[15] THE COURT: All right.

THE CLERK: Stand up.

THE COURT: The court will impose a sentence of three years probation and special assessment of – what is it?

MS. WINKLER: It is a hundred dollars, your Honor.

THE COURT: A hundred dollars. Is there anything further?

MR. ROMANO: No, your Honor.

MS. WINKLER: No, your Honor. (Clerk and court conferred.)

THE COURT: I wish to advise you that you have a right to appeal that sentence.

With respect to the government, what's the status of the other three defendants?

MS. WINKLER: Your Honor, I believe they are waiting to see what happened here today. There are further discussion [sic] under way.

MR. RUSSONIELLO: Your Honor, would the court note our appearances on behalf of the other defendants? We are here, Mr. Wall, Mr. Dwyer and myself. I am Joseph Russoniello from Cooley Godward in San Francisco. I represent Gerald Cullen and here with my co-counsel Kevin O'Day.

* * *

[16] MR. DWYER: Thomas E. Dwyer, Junior, for the defendant Beno Kon.

MR. WALL: John Wall for Bill Thurston.

* * *

[18] MR. WALL: Your Honor, my client Bill Thurston I've mentioned to you previously, as with the other defendants, thinks he is innocent and he has a

difficulty in acknowledging to anybody, especially to his Mormon community, even by way of [19] a nolo plea, that there is any guilt associated with his conduct.

* * *

[20] MR. WALL: He won't plead. He wants his day in court.

THE COURT: Well then, let's give it to him.

MR. WALL: Exactly.

THE COURT: Why don't we give it to him?

MR. WALL: Yes. Now, things change.

THE COURT: And you know, you've got to tell him about the acceptance of responsibility, not that this court would ever increase a person's sentence because he exercised his right to go to trial, but one has to bear in mind the lack of acceptance of responsibility.

MR. WALL: Your Honor, he is not responsible for any improper conduct. He is not.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA **v.** **WILLIAM THURSTON**	**CRIMINAL No. 98-10026 EFH**

DEFENDANT WILLIAM THURSTON'S SENTENCING MEMORANDUM

Cooley Godward LLP
Joseph P. Russoniello
Matthew D. Brown
One Maritime Plaza, Suite 2000
San Francisco, CA 94111
Telephone: (415) 693-2000

Attorneys for Defendant
WILLIAM THURSTON

* * *

B. Downward Departure Is Justified Because Mr. Thurston's Record of Charitable Work and Community Service Is Unique, Extensive, and Extraordinary.

Although a defendant's prior good works are not ordinarily relevant under the Sentencing Guidelines, a sentencing court may depart downward on this basis if the defendant's record of charitable work and community service is extraordinary. *See* U.S.S.G. § 5H1.11. A sentencing court is vested with considerable discretion in its determination that a defendant's prior good works are "extraordinary," and will not be reversed unless the court

"abused its discretion." *See United States v. Jones,* 158 F.3d 492, 500-01 (10th Cir. 1998) (citing *United States v. Rioux,* 97 F.3d 648, 663 (2d Cir. 1996)).

To determine whether a defendant's prior good works are indeed "extraordinary," the court must compare the defendant's "record of charitable work and community service to other cases where defendants similarly had records of past community service." *United States v. DeMasi,* 40 F.3d 1306, 1324 (1st Cir. 1994) (vacating sentence where Sentencing Court only compared defendant's prior good works to other defendants convicted of bank robbery). A finding that a defendant's good works are "extraordinary" is particularly appropriate where a defendant displays exceptional generosity not only in terms of money, but also in terms of time. *See United States v. Serafini,* 233 F.3d 758, 773 (3d Cir. 2000) (affirming downward departure where letters sent on behalf of convicted state legislator detailed numerous prior good works performed for his constituents).

Mr. Thurston's prior good works are unique, extensive, and extraordinary. The letters submitted to the Court on Mr. Thurston's behalf reveal that Mr. Thurston is an individual who has dedicated his life to charitable work and community service. This dedication is exemplified by Mr. Thurston's long history of involvement in church-related activities, often requiring him to devote nearly thirty hours per week of unpaid service to the church.

The church has played an integral role in Mr. Thurston's life since childhood. Shortly after graduating from high school, Mr. Thurston served as a Missionary for his church. *See* Statement of William H. Thurston ("Thurston Statement"), attached hereto as Ex. A, at 2. In

contrast to how many young adults ages 19 to 21 typically spend those years, Mr. Thurston spent two years serving his church and the people of Alabama, Georgia, and South Carolina (full-time and without pay) by performing community service and teaching the gospel to those who were interested. (*See id.*) Mr. Thurston excelled as a Missionary, and was appointed to several leadership positions during his tenure (including Senior Companion, District Leader, and Mission Secretary). (*See id.*)

Mr. Thurston's involvement with the church did not end after returning from his Mission. As an adult, Mr. Thurston has devoted countless hours to the church and has continually served in various unpaid church leadership positions, including Sunday School Teacher (twice), President of Sunday School, Member of the Elder's Quorum, President of the Elder's Quorum, Stake Missionary (twice), Member of the Stake High Council, Councilor to the Bishop of the Ward (twice), Youth Advisor, Ward Clerk, Inner-City Missionary, and Supervisor of the Jordon River Temple. (*See id.* at 4-6.)

Mr. Thurston was also appointed Bishop of the church's Hingham, Massachusetts Ward in February 1992, and the appointment was unanimously "sustained" (or confirmed) by the Ward's 400 congregants. (*See id.* at 4-5.) Mr. Thurston served as Bishop of the Hingham Ward or approximately two and a half years. (*See id.*) As a Bishop, Mr. Thurston devoted between twenty and thirty hours per week of unpaid service to his congregation, supervising various organizations within the Ward, managing the Ward's finances, coordinating and leading worship services, and overseeing the Ward's care for its most impoverished members. (*See id.* at 5.) Additionally, as Bishop, Mr. Thurston provided counseling for the Ward's members,

helping them through various tragic events. For example, Mr. Thurston provided extensive counseling to a married couple whose eighteen-year-old son committed suicide. (Letter from Donald P. Mangum to Judge Harrington of 3/10/02, at 1-2.)

Robert S. Wood, Mr. Thurston's supervisor during his tenure as Bishop of the Hingham Ward, expressed praise for Mr. Thurston's performance in that position:

> I called upon William Thurston to act in a . . . voluntary capacity in the Hingham, Massachusetts area, with responsibility for the spiritual and temporal welfare of the members of a local congregation. *I was impressed with the devotion, time, energy, and compassion he brought to this assignment. Critically important, I was equally touched by the enormous integrity he demonstrated – in the conduct of his own life and in the standards he established for and helped others attain. I was . . . struck by his desire to adhere to the highest standards of conduct and to teach those standards, in particular to the youth.*

(Letter from Robert S. Wood to Judge Harrington of 3/1/02, at 1 (emphasis added).) This sentiment is shared by other individuals who were members of the Hingham Ward while Mr. Thurston served as Bishop. (*See, e.g.*, Undated Letter from John M. Howe to Judge Harrington, at 1 ("Bill's conduct [as Bishop] was always exemplary in all . . . areas and in his relationships with the ward members."); Letter from J. Weston Daw of 2/18/02, at 1 ("[During [Daw's /s/ E.F.H 6-26-02] tenure as Bishop,] I found him to be trustworthy, honest, and a man of complete integrity. He would always defend the right and would never compromise his principles.").)

Although the church plays a central role in Mr. Thurston's life, Mr. Thurston's good works have extended well beyond the church. The letters submitted to the Court uniformly indicate that Mr. Thurston is an individual who is always ready to provide help for *anyone* in need. For example, while living in Massachusetts, Mr. Thurston learned that a family from North Carolina needed temporary housing because their daughter received severe head injuries in an automobile accident. The young woman was being treated at a rehabilitation center in nearby Braintree, Massachusetts. During this period, Mr. Thurston offered the young woman's family an extra bedroom in his home for them to stay in while the young woman completed rehabilitation. The woman's family stayed with Mr. Thurston for several weeks. (Thurston Statement, at 6; Undated Letter from Maryanne Zeller to Judge Harrington, at 1.) Mr. Thurston and his family also opened up their home to two individuals from South America who needed a place to stay but had no money. The two stayed with Mr. Thurston until they were able to provide for themselves. (Thurston Statement, at 6; Letter from Holly Williams to Judge Harrington of 2/19/02, at 1.)

Mr. Thurston has also been exceptionally generous with his earnings. Throughout his life, Mr. Thurston has donated ten percent of his gross income to the church. (Thurston Statement, at 7.) In addition to this sizable donation, for several years Mr. Thurston has given $200 each month to the church in support of the poor. (*Id.*) Mr. Thurston also donates to an educational assistance program that provides opportunities for young men and women in underdeveloped countries. (*Id.*) Mr. Thurston has also provided financial support to individuals in need. For example, Mr. Thurston has given or loaned money to

families going through financially desperate times, and has also paid for expenses that the families have not been able to meet. (*Id.*; Letter from John R. Zeller to Judge Harrington of 2/28/02, at 1.)

Mr. Thurston has not only given money to individuals in need, but has also helped many disadvantaged individuals start their own businesses. For example, Mr. Thurston gave money to an individual so "he could start a musical instrument business and get back on his feet." (Letter from John R. Zeller to Judge Harrington of 2/28/02, at 1.) Mr. Thurston also helped the family of his daughter-in-law escape poverty in the Philippines. Mr. Thurston "bought a refrigerator/freezer for [his daughter-in-law's] mother, who now has a business selling ice in their town." (Letter from Courtney MacBeth to Judge Harrington of 2/26/02, at 1.) Because of Mr. Thurston, the "family now has a way to make money and sustain a stable business." (*Id.*; Letter from Floresa Thurston to Judge Harrington of 2/26/02, at 1 ("He has helped my family so much even though he does not know them.").)

Mr. Thurston has also been quick to perform even the most mundane tasks for those in need. For example, one letter states:

> When I was living in Newbury Park, Bill lived nearby. I was suffering from bleeding ulcers and had a horrible night. A truckload of new lawn sod was arriving early the next morning. I was so ill I didn't know how I was going to get it laid on the prepared ground. A knock came on the door and there was Bill, his wife and three sons, and they said they were there to lay the sod. They worked all day and got that sod laid for me. I wanted to

> pay them but they would not take any money for it.

(Letter from Harries A. Lloyd to Judge Harrington of 2/13/02, at 1.) On another occasion, Mr. Thurston helped one of his employees at ARUP put a new roof on his home. (Letter from John R. Penrose to Judge Harrington of 2/21/02, at 1.) On yet another occasion, Mr. Thurston learned of an impoverished single mother who needed her car to be repaired. After unsuccessfully trying to repair the car himself, Mr. Thurston took the car to a service station and paid for the repairs. (Letter from Floresa Thurston to Judge Harrington of 2/26/02, at 1). Mr. Thurston also helps an elderly neighbor on a regular basis by taking care of her yard and fixing items around the house that need repair. (*Id.*)

The letters are also replete with expressions of admiration for Mr. Thurston's ability to provide guidance and mentoring to employees he supervised. A letter from one former employee states:

> I enjoyed working with Bill and feel that out of all of the managers I have experienced in my career, Bill was the best. I credit Bill's mentoring ability as one of the main reasons that allowed me to succeed him in the Director of IT position at ARUP Laboratories. He took enough interest in my career development and ARUP's future that he provided the education necessary to allow myself and the company to be successful.

(Letter from John R. Penrose to Judge Harrington of 2/21/02, at 1.)

The letters also show that Mr. Thurston was fiercely loyal to the employees he supervised and constantly looked

out for their well-being. For example, when Damon Laboratories was facing financial problems, Mr. Thurston urged his fellow executives "to all pull together and go the extra mile so as to keep as many people working as long as possible." (Undated Letter from Gene Scheffler to Judge Harrington, at 1.) After Damon cut its gardening service, Mr. Thurston began performing the work himself. One former employee wrote, "I can still see Bill cutting the grass." (*Id.*)

Unfortunately, because of the jury verdict, Mr. Thurston's church has placed some restrictions on the types of church-related activities he can perform. Undaunted, Mr. Thurston now volunteers five days a week at "Welfare Square," for four to five hours each day, "helping to provide food for the homeless and needy in the Salt Lake City area." (Letter from Keith P. Thurston to Judge Harrington of 3/10/02, at 2; *see also* Letter from Holly Williams to Judge Harrington of 2/19/02, at 2 ("He has been doing public service all his life, recently working at Welfare Square because they won't let him do a church service assignment."); Letter from Marilyn Thurston Manning to Judge Harrington of 2/7/02, at 1 ("Even now, after retirement, he works daily as a volunteer at the Church Welfare Square, where the necessities of life are gathered, prepared and shipped to disaster victims all over the world."); Letter from Courtney MacBeth to Judge Harrington of 2/26/02, at 1 ("Since December, Bill has spent every day at Welfare Square in downtown Salt Lake City. . . . Bill spends his days volunteering at Welfare Square, helping to prepare food, organize donated goods etc.").)

As the letters submitted on Mr. Thurston's behalf demonstrate, Mr. Thurston's prior good works measurably exceed the behavior credited in other cases where downward departures have been affirmed on this basis. *See, e.g,*

United States v. Woods, 159 F.3d 1132, 1136-37 (8th Cir. 1998) (affirming downward departure based on charitable activity where defendant opened her home to two troubled youths, paid for the youths to attend private school, and helped an elderly man who was unhappy living in a nursing home find housing); *Jones*, 158 F.3d at 500-01 (affirming downward departure where victim's close relatives and community leaders submitted letters extolling defendant's past good works); *Rioux*, 97 F.3d at 663 (ruling that district court did not abuse its discretion when it departed downward on the basis of defendant's kidney disease and fundraising for the Kidney Foundation).

Mr. Thurston has dedicated his life to helping others and serving his church. He has not only been involved in his church as a member, but has served in numerous high-level leadership positions, devoted countless hours to church-related activities, and has provided counseling and support to other members. Beyond this, he has given *at least* ten percent of his gross income to his church throughout his adult life. He has also displayed an uncommon willingness to give to others by, among other things, opening up his home to families in need, giving (and often forgiving) loans to individuals to help them get back "on their feet," performing household tasks for individuals who are physically unable to do them, and devoting up to twenty-five hours per week providing food for Salt Lake City's homeless population. Accordingly, because his prior good works are extensive, unique, and extraordinary, the Court should exercise its discretion to depart downward from the recommended Guidelines.

STATEMENT OF WILLIAM H. THURSTON

At the request of my attorneys, I have prepared the following summary of my background, family, and prior involvement in charitable, community, and church-related activities. At the outset, I would like to say that I feel somewhat uncomfortable writing this because I did not perform these activities for the purpose of conveying a positive image of myself to others, which would contradict my own deeply held beliefs. I am offering this summary with the hope that the Court will recognize that the government's portrayal of my conduct throughout this case is inconsistent with my own longstanding core values.

Background

I was raised in a small community in Southern Utah. My father had spent many years as an educator, teaching school and then serving as a school administrator. Just before my birth, my father made a decision (for health and family reasons) to leave school administration and return to the town of my mother's birth. Here, my mother would be able to improve her own health and care for her aging parents. My father took up farming and ranching.

I spent my formative years with my father, helping with a developing farm and cattle ranch. I learned to work hard. The farm and ranch required mostly manual labor, as we could afford only the basic tools, including a pickup truck and a small tractor. Sometimes I felt that I was deprived of the fun and games enjoyed by friends my age, but I never rebelled or failed to do the work given to me. Only after several years as an adult did I recognize the value of the work ethic that I had learned.

I finished high school in 1963 near the top of my class, receiving the coveted "Block H" pin, which was awarded to a few students elected by our teachers. Mine was studded with tiny pearls, indicating I was in the top three. I immediately left home to attend a radio engineering school, awarded to me as a college fellowship by the radio station in the city where I would attend college. The fellowship paid for my schooling to obtain a First Class Radio Telephone license so I could work as a station announcer and engineer while I attended college.

I completed the courses and passed the FTC tests for third-class, second-class, and first-class radio-telephone licenses in about two months time and began my work at the radio station (KSUB) in Cedar City, Utah before the fall college schedule began. My radio station work paid most of my college expenses (except tuition) during that first college year.

While I enjoyed college life and radio station announcing/engineering during that year, I also felt a desire to become a missionary for the church to which I belonged. The Church of Jesus Christ of Latter-Day Saints, often nicknamed the "Mormon Church," provides opportunities for young men and women to serve two-year "missions." Missionaries are full-time volunteers who perform community service and teach the gospel to those who are interested. In the fall of 1964, I accepted a full-time two-year assignment to serve in the Southern States Mission (with an area encompassing Alabama, Georgia, and South Carolina). I paid my own expenses (with some help from my parents and the sale of some livestock I had acquired).

I entered the mission in the fall of 1964 and served the church and the people of Alabama, Georgia, and South

Carolina faithfully for the two-year period. Although restricted somewhat by physical problems resulting from being hit by a drunk driver, I was provided opportunities for leadership: I became a Senior Companion (missionaries always work in pairs) in six weeks, was appointed as a District Leader in about eight months, and was then appointed as Mission Secretary for much of the second year. This assignment provided me the opportunity to spend lots of time with the Mission President, where I learned much at the feet of a great church leader. Values of Christian life that I had been taught at home were re-enforced and strengthened. I determined that honesty, hard work (both vocational and church related), charity, service, and family loyalty would be the basis for my life's work.

Upon completing my missionary service, I enrolled in college at the University of Utah. My chosen career was to be Electrical Engineering, but I spent only one year at the University. The injuries sustained in the accident during my mission required surgery and significant physical rehabilitation. With no insurance and significant expenses, I dropped out of school.

I obtained full-time employment with a military contractor, which made electronic and computer equipment for military aircraft. Thus began my career in computer technology. Without a formal education in computers and medicine, I had to learn "on the job" and through self-study. But by applying the principles described above at home and through missionary service, I have progressed through technical and management experience to senior management positions, including my work at Damon Clinical Laboratories and the last seven years of my work experience as a Senior Vice President at

ARUP Laboratories, a $150 million branch of the University of Utah. I terminated my employment at ARUP last year to prepare for trial and to avoid the possibility of negative publicity toward the university should the trial become a news event.

I now provide an accounting of some significant activities of my adult life thus far in four categories: church service, charity, other service, and family.

Church Service

I mentioned above that I devoted two years of my life (age 19-21) to missionary service. This service included teaching interested persons about Christianity in general and the Mormon faith in particular. Much of my time was also involved in helping to establish congregations in areas where the church was not yet well established, and providing community service to towns and families where I resided. As mentioned above, I also was given leadership responsibilities. This was a very rewarding time of my life where I learned that service to others brings more happiness than the accumulation of wealth, possessions, or prestige.

Following my missionary service and after my marriage to my wife Betty, I have been given many opportunities for continued church service. I should explain here that the Mormon Church is organized almost entirely with lay leadership through a hierarchy from the head of the church to the positions within each congregation. My positions of leadership have been within a congregation (called a Ward), an organized group of Wards (called a Stake), and within a group of organized Stakes (called an Area). Areas report directly to church headquarters. The

leader of a Ward is called a Bishop. The leader of a Stake is called a Stake President. The leader of an Area is called an Area Authority for the President of the Church. Church members do not seek positions of leadership. Rather, members are appointed (called) to positions of leadership by those in higher leadership positions. These "calls" are made after careful study and prayer and must be sustained by the Ward or Stake members where they will serve. Leadership positions usually last from two to ten years, after which the individual returns to regular church member status. An individual who is called to a position has the option not to accept it. There is no compensation for serving in these positions.

I was first appointed as a teacher in the Sunday School and in organizations of adult men and youth. Within a few years, I was called to be the President of the Sunday School in the Ward where we lived. I served in this position for about two years. Very soon thereafter, I was called to serve in the Presidency of the Elders Quorum (an organization within the Ward) and after a year was called as the President. I served in this capacity until we moved to California where I was again called to serve as the Sunday School President.

I was then called as a Stake Missionary. Stake Missionaries help full-time missionaries who serve within the geographical boundaries of a Stake. I served in this position for almost two years when I was called to be a member of the Stake High Council (twelve people who assist the Stake President). I served in this capacity until I was called to serve as a Councilor to the Bishop of the Ward in which I resided. About three years later, this Bishop was released from his assignment and I was called to be an

advisor to 16-18 year old young men. I served in this capacity until we moved to Boston in 1990.

Almost immediately after this relocation, I was again called as the advisor to 16-18 year old young men. This calling lasted only about six months because I was again called as a Councilor to the Bishop of the Hingham, Massachusetts Ward. One year later that Bishop was released and I was called as the Bishop.

Some explanation of the position of Bishop may be helpful. The Bishop, typically referred to as the "Father of the Ward," is similar to a pastor in other churches. The Bishop has full responsibility for the functioning of the Ward (which typically has 300-500 members), overseeing the individual leaders of various organizations within the Ward, including two councilors. The Bishop also has responsibility for the finances, care of the poor within the Ward, counsels members who have problems and helps them to find solutions, and takes charge of the worship services and determines the topics of sermons. A Bishop's appointment must be sustained by the Ward membership.

During my tenure as Bishop of the Hingham congregation, I spent between twenty and thirty hours per week fulfilling the responsibilities just mentioned. It was a challenging assignment, but I was unanimously sustained as Bishop by the 400 members in the Ward. There were many experiences that did not have a joyful ending. For example, when there were deaths within the membership of the Ward, I had the responsibility to provide council, comfort, and funeral services. Some deaths were the result of tragic events, which were particularly difficult. I also had a situation where I learned of child abuse, which I reported to the proper legal authorities, and which

entailed providing counseling to the individuals involved. But there were many more challenging experiences with happy endings. The joy of participating in the progress that individuals and families make in their lives is hard to describe. The members demonstrated their capacity for love many times over. I made many life-long friends during my time in the Hingham congregation.

I served as a Bishop until we moved to Salt Lake City (one year after Damon was sold to Corning). Soon after our relocation, I was called on another Stake Mission. At about the same time, I was also called to work in the Jordan River Temple (similar to the temple now in Belmont, Massachusetts). I served in both positions concurrently. After my Stake Missionary service concluded, I was called to serve as the Ward Clerk, where I was responsible for all Ward record keeping. I was also called as a Supervisor in the Jordan River Temple.

When we moved to our current address near the temple, Betty and I were called to serve together as "Inner-City Missionaries." This calling is a special one to help those in the poor areas of Salt Lake City to receive whatever assistance may be needed to raise their level of self-reliance. We continued in this assignment, helping church members and non-members alike to rise above their poverty conditions, until our service was interrupted by the trial of last year. I also continued my Supervisor responsibilities in the temple until that same time.

The outcome of the trial placed some restrictions on my official church service. Given the local news coverage of the trial outcome, we agreed with Ward, Stake, and Area leaders who considered it best to protect the good name of the church. I was released from my temple assignment

and Betty and I were released as Inner-City Missionaries. We are now somewhat in a state of limbo until the final outcome of my legal status is determined.

I would like to state here that I do not boast in these many church positions of responsibility. I did not seek them but I always responded positively when called and have tried my best to do what's right in each position. All these years of church service have been a great blessing to me and to my family. While I have given many thousands of hours of my time in service to others, I can only say that I have received so much happiness that I do not consider it to be a great sacrifice. There are no one-way streets in service to others and to God. It is my hope that I may yet provide years of service in whatever position for which I am called.

Charity

Betty and I have on several occasions taken into our home those who needed a place to stay for awhile. I will give two instances.

In one instance, we learned of a young woman from South America that had come to the United States to get a high school education. She needed a place to live but had no ability to pay. We had an extra bedroom so we invited her to stay with us. Soon her brother also joined us. They stayed with us until they were able to provide for themselves. They are both married now, happy and productive citizens.

In another instance, we learned that a family from North Carolina needed temporary housing for the parents of a daughter that had received severe head injuries in an

automobile accident. The daughter was to be treated at a rehabilitation center in Braintree that specialized in head injuries. Upon learning of their need, we offered them an extra bedroom. They stayed for several weeks. Other members of their family joined them.

I have consistently made charitable donations to certain organizations. I have always paid ten percent of my gross income as a voluntary contribution to the church. For many years, I have also donated $200.00 each month to the church in support of the poor. I also donate to an educational assistance program that provides opportunities for young men and women in underdeveloped countries to learn a skill that enables them to rise out of poverty.

In addition to donations to organizations, Betty and I have responded to many situations where we could see that aid would benefit individuals or families that we have known. For example, on several occasions we have either given or loaned money when we could see that it was genuinely needed. In other cases, we have paid for expenses that otherwise could not have been paid. We have never taken action against individuals who did not repay the loans we made. In my view, it is better to be forgiving than to be aggressive.

Other Service

My church service has taken a lot of time, but not so much as to preclude other types of service in the areas where we have lived. I have spent a considerable amount of time and energy with the Boy Scouts of America. As a youth I participated in scouting and attained the highest rank (Eagle) at age fifteen. As an adult, I volunteered as a

merit badge councilor, served on several troop committees, and served as a Troop Committee Chairman. I have spent countless hours with scouts in meetings, campouts, and other scouting activities. Two of my sons have also attained the "Eagle" rank. The other two attained the second highest rank of Life Scout. I have donated thousands of dollars to scouting programs and continue to do so, even though my sons are now adults.

Being good friends and neighbors has also been a priority. Our family has made considerable effort to help those in need, without waiting for a crisis or someone to ask for it. I hesitate to give many examples because I do not wish to appear to boast. I will give a few. Some of the letters that have been written on my behalf may refer to other examples.

Many years ago, we became acquainted with a family that had many physical needs. During the holiday season, we determined that we could sacrifice some of our holiday gift expectations in order to provide for this family. We determined what they most needed and provided those things anonymously. It was a good experience. Since that time, we have done it every year, many times with several needy families and almost always anonymously.

Time is the best thing to give. When you give of your time, both the receiver and the giver are blessed. Sometimes I have given my time in the form of physical work, such as cleaning houses or yards. Sometimes the time has been counseling. Sometimes it has just been being a friend. But it has almost always provided a little brighter and happier future for someone.

Since returning from the trial, I have been volunteering at Welfare Square in Salt Lake City. Welfare Square is

a church sponsored program that provides food and clothing to those in need, regardless of whether or not they are church members. The program also provides food supplies for the Salvation Army, several homeless shelters, the YWCA, and un-wed mothers programs. From mid-January to the present, I have been spending four to five hours per day (four to five days per week) assisting in this effort. I work in the Bishop's Storehouse as a laborer, doing whatever the managements asks of me. I receive no compensation of any kind. Seeing firsthand the troubles others have (and helping them) makes my troubles appear lighter and puts them in perspective.

Family

I conclude with some review of family relationships. I have left this until last because it is most precious to me of all that I have. No other priority reaches the priority of family life and family needs.

May I first relate a little about Betty. Betty and I made the decision early in our marriage that she would devote her all of her time to our children, our extended family, and community service. This she has tirelessly done ever since our first child was born. Her reputation of love and service to others exceeds mine. I shall ever be a follower of her example. I greatly appreciate her love and support throughout the past years of this investigation, indictment, and trial. She has been a pillar of strength whenever I needed it.

We are proud of each of our four children. All are now adults and responsible members of society. Three have served full-time church missions. Each is well-educated and self-sufficient. One has followed in my footsteps to

work in healthcare. Another works in classified military engineering, and another in computer science. It has been rewarding to see them choose fields that have been similar to mine. In August of this year, our last son will graduate from college. They also have been supportive during this legal ordeal. Each came to Boston last fall to support us during the trial.

Our parents have been (and continue to be) a big priority for us. One of the reasons for leaving Corning (one year after its acquisition of Damon) was due to the ill health of my mother. We hoped that if we relocated to Utah, she would live with us and that we could care for her. We built a new home in the Salt Lake City area with a separate area that would give her privacy, yet have the advantage of our assistance whenever she needed it. Unfortunately, just one month before the home was completed, she passed away.

We now have a similar plan for Betty's parents. Her parents are at a stage where they need assistance. Her mother is 90 and her father is 87, with an advancing illness. They still live in Georgia but are excited to relocate to southern Utah (where it is warmer) to be with us. Plans have been made for two homes, where we can live as neighbors, giving them the independence they still desire, but with us close by whenever they need us. Our home is being designed with a large room for future use by Betty's mother, as her father's illness will likely cause his death within a few years.

I would be happy to expand on any of what I have written above, or to provide any additional information the Court requests.

/s/ William H. Thurston — June 17, 2002
William H. Thurston — Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA

vs. CR. 98-10026-EFH

WILLIAM THURSTON

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BEFORE THE HONORABLE EDWARD F. HARRINGTON
United States District Judge

Courtroom 19
1 Courthouse Way
Boston, Mass. 02210
Wednesday, June 26, 2002

APPEARANCES:

FOR THE GOVERNMENT:
Michael K. Loucks, AUSA, and
Susan G. Winkler, AUSA
U.S. Attorney's Office
United States Courthouse, Suite 9200
1 Courthouse Way
Boston, Massachusetts 02210

FOR THE DEFENDANT:
Joseph P. Russoniello, Esq. and
Matthew Brown, Esq.
Cooley, Godward, LLP.
One Maritime Plaza
San Francisco, California 94111
(415) 693-2014
Representing William Thurston

* * *

[2] THE CLERK: Criminal 98-26, United States versus William Thurston.

THE COURT: I'll hear from the government.

MR. LOUCKS: Good afternoon, Assistant Attorney Mike Loucks, with me is Assistant Attorney Susan Winkler.

The United States makes a recommendation as set forth in the sentencing memorandum that the Court sentence the defendant to 60 months incarceration, the Court make no order of restitution. The parties are in agreement that any restitution here for losses incurred was made by Damon, the defendant's prior employer, when Judge Keeton sentenced Damon in 1997, I believe it was, your Honor, '96.

We also recommend that the Court impose a special assessment that's required and that the Court impose a fine of $125,000.

I'm going to go through and I'm prepared to go through what I think are the issues in dispute. Principally, they concern, the parties agree on the base-offense level, and I think that's about it. The fiscal issues in dispute here concern calculation of loss, the offense leadership role, acceptance of responsibility, and whether there are grounds for departure. With respect –

THE COURT: Why don't I, let me get your recommendation first then I'll have counsel for the defendant to see what matters he's going to argue and then [3] you can respond to him.

What's the – It's 60 months incarceration, $125,000 fine.

MR. LOUCKS: Three years supervised release.

THE COURT: Three years supervised release.

MR. LOUCKS: And a special assessment.

THE COURT: Of 100.

MR. LOUCKS: Of 100.

* * *

[35] MR. RUSSONIELLO:

* * *

[38] The point is that the government is insisting on these two prongs that Mr. Thurston did something more than just sort of insist on his right to trial because they're now in here asking for something substantially different than they stood still for with Mr. Isola who was the president of the company, who if anything had more culpability and responsibility than Mr. Thurston had and who in his wisdom, and I think correctly, saw should suffer no more than the $125 special assessment and a period of probation.

But in order to differentiate Mr. Thurston from Mr. Isola and so as not to raise the suspicion that he's being punished for asking for a trial, they have conjured up these two props that somehow or another he's involved in concealment, that he also lied in his testimony. And I submit that there is no basis for finding either.

If the Court were to consider that any calculation of loss results in a, an offense category greater than eight which would subject Mr. Thurston to some community detention of some sort or more than 12 which would subject him to some split sentence or worse, we submit

that there are very good grounds for downward departure here which are not –

THE COURT: Let me go into downward departure later.

[39] Let me have the government's response on the question of offense level.

MR. LOUCKS: Thank you, your Honor.

With respect to the loss, your Honor, the guidelines provide for using actual or intended loss, whichever is greater. The actual loss here, and the Court need not prove nor need there be evidence of a loss with precision. And I draw the Court's attention to United States versus Sidhu at 130 F. 3d, 644, Page 651.

The point of determining a loss really is to figure out what's a just punishment. In some respects, I'm standing here in a different position than the Court often sees from Assistant U.S. Attorneys. The actual loss here is substantially greater than $5 million. The actual loss here for the bundling of the Ferritin iron testing, which was a dual program, was about $16 million.

There is evidence before the Court, the prior sentencing of the corporation, the prior charge in the corporation, and the prior payment by, of restitution by the corporation in that amount. But we're not here arguing that. We're not here arguing that because, in some respects, that would be holding the defendant in terms of his punishment of sentence, not a restitution order, but that would be holding him responsible for conduct at, for example, the Tampa laboratory which added irons, the Dallas [40] laboratory which added Ferritins and irons before the laboratories under his supervision.

* * *

But again, I'm not here arguing that the Court should find a loss of $16 million. I think that the Court should punish Mr. Thurston for what his intended crime was, and the best measure of his intended crime is what was in his mind and documents he signed for what money he expected to get from the trickery, fraud and deceit, and that's the $5 million figure. That does not punish him for bundle [41] tests done in the laboratories. It does not punish him even for the growth in Damon's business over time because those capital expenditure requests do not anticipate that Damon is going to grow from a relatively small company in 1988 to a $330 million business by 1993. It in fact just captured what was the intent at the time of the criminal conspiracy's inception.

We are trying to offset this amount of money that Medicare is going to save. We're going to do this that's going to result in not only offsetting that but getting us some extra. That's what our position here at sentencing is, is to capture that amount, to capture what he intended to punish Medicare through the criminal activity, what he, he and others intended to collect from the Medicare program, and in fact got a lot more, your Honor.

* * *

[60] THE COURT: All right, I've heard arguments with respect to the offense level.

His criminal history category I guess is one.

MR. RUSSONIELLO: Yes.

THE COURT: This is my ruling with respect to the offense level. A base offense level of 6, an aggravated

role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

At this time I'll hear arguments with respect to a motion for downward departure. And I'd like argument at least on any factor that you wish to raise, but especially on two factors, the first Argument B in the Thurston's sentencing memorandum contained on Page 22, namely, downward [61] departure is justified because Mr. Thurston's record of charitable work and community service is unique, extensive and extraordinary, and Argument D on Page 34, namely, downward departure is justified in order to effectuate the sentencing guidelines policy of sentencing similar offenders to similar punishments.

And we have in view defendant Isola's sentence which was three years probation.

I'll hear counsel for the defendant on those two grounds and any others they wish to add.

* * *

MR. RUSSONIELLO: I've been a prosecutor for more years than I've been a defense lawyer, you [sic] Honor, and I think over the period of time I certainly have, it's been now 30 years, I think over that period of the time I've developed a pretty good sense of, well, outrage, certainly, at times, of balance because I've, in a sense, been on both sides of these things and have had a lot of experience [62] dealing with people who I prosecuted as well as people that I represented.

As the Court knows, Mr. Thurston was not my client until December of 2001 when Mr. Wall took sick and after Mr. Cullen's case was disposed of and we assumed that responsibility at his request.

We had heard up until that time, this is all pretty much reflected in the filing here, we had heard up until that time about Mr. Thurston's sort of commitment to his church and to his family and to his community as being somewhat extraordinary. Now most of that information was, of course, hearsay, it can came to us from Mr. Wall. And I guess that while we had some association with Mr. Thurston, it really wasn't until we got to the point of having to deal with his conviction that it was our obligation to kind of look into this with a microscope to find out, you know, whether this was really, is it possible that somebody can have this kind of an attitude, somebody can be this sort of committed to other people, be as selfless? I think over time I've gotten pretty hardened to the con man and somewhat jaundiced at the notion that there are still people out there who, you know, are good, fundamentally good.

But this, finally, this discussion of ours which consumes almost seven pages is not a chalk. It's not, you know, lint or fluff. I mean it is reported accurate [63] evidence of his extraordinary behavior over time, long time. Before this arose, this case arose, during the time the case pended, after the conviction and since, somewhat now limited by his own church's decision that, for perhaps obvious reasons, perhaps not so obvious reasons, they didn't want him to be as out front as he'd been in the past. But the Sentencing Commission finally over time, I think has come to recognize that this callous, cold, matrical, factory like calculation of sentence would do an injustice in

certain circumstances, would be unfair, fundamentally unfair, and that there were people who deserved special consideration. Not people who just said, you know, my family is going to miss me, not people who said, I've got somebody I need to take care of, you know, down the street, not somebody who says, my family is not going to be supported now because I'm going away, not somebody who says, you know, he's a pretty good Joe and you know, fellow well melt kind of person. But somebody who really deeply committed himself so much to others that the conduct, we would call it abhorrent conduct, the engagement in the activity is so outweighed by the person's selflessness that some serious consideration should be given to it. There is no one that I have ever met in my life who better typifies that, that case and that entitlement than Bill Thurston. It's difficult to go through, you know, each of the specific events which we [64] reported here, but we reported them. We have reported them both here and the testimonial to that from people who, they weren't solicited, some obviously called and said they wanted to be heard, others who just heard about his difficulty who volunteered information, hundreds, I guess, of these letters that came, and certainly dozens of these letters that came in that I didn't even see that came to probation or to the Court or both. It's hard to overstate that his, his consideration by this Court would not be gratuitous but earned because of his extraordinary conduct.

As to the proportionality, if you want me to go on to the question of parity.

THE COURT: Let me hear the response with respect to – What's the position of the government with regard to a motion for downward departure on the basis of

his record of extraordinary charitable work and community service? There is no doubt that he does fit in to an unusual category.

MR. LOUCKS: Your Honor, I think that there is no doubt that he has over the course of his career done extensive community and charitable work. But I note, your Honor, that he is in no different position than any other highly paid corporate executive who has similarly had the opportunity based upon his position in society –

THE COURT: I differ on that. Without talking about whether he's a highly paid corporate executive, I [65] think the evidence reflects here that he did something more than the usual corporate executive, in my judgment.

MR. LOUCKS: Your Honor, I'd like to draw the Court's attention to a series of cases involving Everett Crafts, United States versus Kohlbach, and I'm going to read to the Court a quotation from that, one of the opinions, because there were three opinions in that case, two reversing downward departures based upon an extensive history of charitable good works. This is what the 6th Circuit said at the time of the second reversal:

> "We need not set a specific standard for how far above average an executive's community service must be to qualify for this departure, but can say with confidence that Craft's community service resume strikes us as not highly unusual for a person in his position. We acknowledge that the additional testimony established that Craft undertook community service efforts at a relatively young age and before he was an executive. We also acknowledge the fact that the testimony elevates him above the class of executives who donate only money or lend only their name. In the final analysis, however, we must be content to thank him

for his generous [66] efforts but conclude that they are not sufficient to allow him to serve less time for the offense that he has committed."

Your Honor, we have addressed this issue head on in Pages 14 and 15 of our filing. I draw the Court's attention in that to the United States versus Kohlbach. It is usual and ordinary in the prosecution of similar white collar crimes involving high-ranking corporate executives to find the defendant was involved as a leader in community charities, civic organizations and church efforts.

I drew the Court's attention as well to the statement in United States versus Weinberger that downward departure should not be used for the advantage in society to have the luxury to donate time and resources, to be able to use that after they have been found guilty of crimes of dishonesty to buy their way out of the applicable jail sentence.

Your Honor, I certainly think that, you know, I can't stand here and I don't have prior sentencing proceedings involving prior individuals who are highly paid, highly, in stature and in organization, corporate organization, executives standing before a federal judge for sentencing. I don't have a comparison, if you will, of prior individuals whose Presentence Reports I have been involved with, whose sentencing I've been involved with [67] where they were being sentenced by the Court for a healthcare offense.

Mr. Thurston's community and charitable work is extensive, but I see it, it really is no different than other individuals that I've seen over the years. And I also think that rulings in those cases that I cited are appropriate here. I think Mr. Thurston is to be commended for what he

has done in the past, but it does not and should not be used as a basis by the Court to depart downwards, to result in a substantial reduction of any sentence that should be imposed upon him.

Thank you.

THE COURT: I'll hear you on whatever response you wish to make and then on your, whatever else you wish to add.

MR. RUSSONIELLO: Cold, cold, cold and calculating is the only way to describe the government's view in this case. I mean this is the same government that gives Mark Rich a pardon for building homes in some foreign country. I mean this, we're talking here about a person whose involvement in criminal activity is, as I've said till I'm now virtually blue in the face, a novel theory of culpability whose conduct toward the community predates that by a generation and who, according to the witnesses who testified in the case as co-workers, lived this sort of, I [68] don't want to sort of gild the lily on this, a Christian life, a Christ-like life every day. How many people do we know who do that? How many people in the U.S. Attorney's Office are there that do that? How many people on the bench are there that do that?

THE COURT: Well, I know one.

MR. RUSSONIELLO: One. Hopefully the spirit of mercy and justice will prevail.

THE COURT: Let the record reflect that that's said in levity. I'm not holding myself up as a paragon.

MR. RUSSONIELLO: And up until recently we assumed that certain, you know, individuals by virtue of their commitment to a vocation did and they didn't.

If not in this case for Bill Thurston, then no one, no one. And I submit that whatever may have been the interest of the Court in Kohlbach and whatever may have been persuading the Court in the Weinberger case and so on, and there may have been, you know, extenuating circumstances there that mitigated against a downward departure. In this case, if this, if this sentencing instruction and guidance is to have any validity whatsoever, any whatsoever, it's a kind of person like Bill Thurston who should get the benefit of it. This isn't just hyperbole, you know, this is fact.

Now, this parity of sentencing. Again, without boring the Court with my experiences, the whole purpose for [69] having the sentencing guidelines in the first place was because, quite frankly, the conclusion had been reached by whomever that giving the Court discretion to sentence was a mistake and that because of the divergence in sentence in the same court, in the same district, between judges who were, you know, soft on drugs, judges who were hard on drugs, light for bank robbery, you know, heavy on bank robbery, tough on white collar crime, light on white collar crime, the sentencing guidelines were put into place in order to ensure that there would be parity, that people charged with the same events on the basis of the same evidence would receive the same sentence. That was the whole purpose. The only entity, the only component of our system that, quite frankly, the Sentencing Commission believed could be trusted with the responsibility to sort of be fair and respectful of this objective was the prosecution.

Defense lawyers certainly couldn't, judges have demonstrated that they couldn't. And what we've seen over time, much to our chagrin, is that instead of that being the objective of the effort, charging has become a mechanism and a device for prosecutors to basically manipulate the sentencing guidelines any way they want, okay, that's fine, we asked for it, we got it.

But in a case such as this where the government doesn't squeak at the idea of the president of the company [70] charged with Apo transgression, charged with Ferritin transgression, charged with, you know, iron transgression, all of these tests, who has overall responsibility for not four labs but 16 labs at a time after the, after the company has already, you know, spent $119 million in fines and penalties, paid criminal sanctions and so on. And the defendant gets 125 days – excuse me, $125 special assessment and three years probation, and the government doesn't squeak. So the government can now come in and say, oh, yeah, by the way, this is a different case. Mr. Thurston is really the linchpin of this mob and this conspiracy, and to give him 60 months would be generous because the sentencing guidelines say he really should be getting 78 to 80, or whatever the number is.

In order for want objectives of the sentencing guidelines to be respected in spirit as well as in the letter of them, in order for the government to sort of be once again reminded of its oath and its responsibility, sentencing Mr. Thurston to no more than Mr. Isola was sentenced to, despite the fact there has been a trial, is not only fair and reasonable, it's compelled, in my view, my view, but it's compelled.

I don't know how many more sentencing cases this Court will be involved in, but this has been an extraordinary experience for all of us, I think, and we have [71] spent a long, long, long time together on this, but I think that he we have come out at the back end where we went in on the front end in terms of recognizing this was a novel approach of creative prosecution targeted against some individuals who were decent people, who fundamentally, if anything, got themselves caught up in abhorrent behavior and who'd benefit not at all from incarceration and provide no deterrent whatsoever to anyone similarly situated, given that the government has found a way to sort of rectify the problem it may have created in the first place by its collective indifference over 20 years before, before this, before this episode even began.

So I submit that there is more than sufficient basis for the Court to exercise its discretion here and to impose a sentence consistent with the sentence imposed on Mr. Isola.

THE COURT: Well, at this time I'm only going to grant the motion for a downward departure, and I'll hear further argument as to what the appropriate sentence should be. But in granting the motion for downward departure, I'm basing it on two grounds.

First, the downward departure is justified because of the defendant Thurston's record of charitable work and community service is unique, extensive and extraordinary. I think the record should reflect that in over 14 years of [72] sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church.

And the second ground is that which is set out in the United States Sentencing Commission Guidelines Manual under Chapter 1, Part A, Section 3, which is entitled "The Basic Approach, paren, policy statement," unquote or, "The Basic Approach, paren, policy statement," closed paren, setting forth the rationale of the guidelines, it's cited here that Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

We have a situation here where coconspirator Isola, the president of Damon and the architect, at least the prime architect of this conspiracy, received a sentence of three years probation, and it is, in my judgment, a violation of the fundamental purpose of the Sentencing Commission Guidelines to impose a sentence which is not at least somewhat similar to that incurred by a coconspirator who was more involved in the conspiracy tan [sic] this defendant.

So at this point I am granting the motion for [73] downward departure based on those two specific grounds.

At this point I would – I think for the sake of all parties, why don't we take a three-quarters of an hour and I'd like to hear arguments on what would be an appropriate sentence in view of the defendant's extraordinary character and service, devotion to his church, and especially how to make any sentence imposed comparable to that which was imposed upon the president of Damon, Mr. Isola.

So let's return at quarter of two.

(Recess.)

THE COURT: I'll hear from counsel for the defendant.

MR. RUSSONIELLO: Your Honor, our –

THE COURT: First of all, I'd like whatever argument you make, whatever way, but using the president, Mr. Isola, as a guideline.

MR. RUSSONIELLO: Yes. And the Court recalls that Mr. Isola was sentenced to a period of three years probation and a special assessment of $100. And taking into account the fact that Mr. Isola was president of the company, that he had responsibility for all operations of Damon for the entire period of the alleged conspiracy, that Mr. Thurston was one of his subordinates who only for a period, a short period of the time of the five years, actually had [74] supervisory responsibility for the laboratories but moved to Boston and assumed administrative responsibilities totally unrelated to any of the billing practices, and was certainly, Mr. Thurston that is, would be far less culpable in the grand scheme of things than the president of the company.

In order to achieve parity and proportion of sentence and proportionality, as the Court has indicated are the keystones of the notes to the sentencing guidelines, we believe that under no circumstance should Mr. Thurston be sentenced to anything more than the statutory penalty of $100 and a period of probation, if appropriate, not to exceed three years. So a downward departure to 8 or less in order to accomplish that is our recommendation.

THE COURT: In looking over the guidelines, it would appear that the sentence that was imposed was

based on, I would think, an offense level of 8, because anything over that would have required a period of, I think, incarceration.

MR. RUSSONIELLO: Some community service. Anything 9 or 10 would have required some.

THE COURT: The way, in retrospect, that had to be calculated, it had to be calculated by the basic offense level of 6 and an aggravated participation of four minus two for acceptance of responsibility.

[75] At least with respect, even with respect to the issue of parity or no disparity between similarly affected or involved defendants, I've already ruled that this defendant does not receive the two points for acceptance of responsibility, and therefore, at least in my initial judgment, that there is a basis for some difference between Mr. Thurston and Mr. Isola in view of the fact that one in pleading to this case received a two point deduction. How – how do you say that should not be considered?

MR. RUSSONIELLO: Well, I have no real response to that. If the Court is going to consider that the, that it feels bound by the determination of the calculation of offense level for purposes –

THE COURT: I'm not bound by it but it is a guideline in the way I'm calculating it, I have to have some basis for calculation.

MR. RUSSONIELLO: We would submit that the parity and proportionality is only one of the two combined grounds that the Court is taking into account in deciding the downward departure, that the other ground, charitable works, extraordinary charitable works was something which was not in play at all with respect Mr. Isola, and

therefore the Court has the discretion to consider in departing downward to include in the relief, as it were, that it's given to Mr. Thurston the extraordinary special circumstance of his [76] charitable works so that to reach a level of 8 takes into account that, under the normal circumstances, parity by itself, 10 might be the appropriate level, but including his charitable works as factor in the downward departure calculation, 8 is still proportional and is relatively equal, it doesn't have to be exact but relatively equal to what Mr. Isola received.

THE COURT: The other factor out there is that although I granted a motion for downward departure in accordance with my original calculations of an offense level of 26, to reduce someone's sentence from 63 months, or in this instance from 60 months, to probation is extraordinary.

MR. RUSSONIELLO: It is. And if it were not for Mr. Isola's sentence, the Court would not have any frame of reference, because no doubt when Mr. Isola was sentenced, the intended loss, the actual loss was what had been determined to be approximately $16 million. The intended loss, the calculated loss was of no consequence whatsoever to the government at that time in arguing Mr. Isola's, or in arguing against Mr. Isola's sentence.

And presumably the government was as committed to its assessment that the loss was 16 million then as it was now. And the reason I say that is, the indictment in this case originally did say, did plead as an element that the loss suffered was $16 million. The Court may recall that in [77] conforming the sanitized indictment to prove, the government dropped, voluntarily dropped any reference to the dollar amount because it hadn't proved any, and so

that issue went to the jury for its consideration. Defense obviously argued that referring to the $16 million was highly inflammatory. But the fact of the matter is, the government has contended right from the get go in the indictment that $16 million was the calculated loss, therefore if it had or was to have any merit for purposes of Mr. Isola's sentence, it was dismissed as unimportant, and for purposes of Mr. Thurston's sentence proportional to Mr. Isola's and in relative parity to Mr. Isola's, it should be given the same value, i value [sic], it's not.

THE COURT: I'll hear from the government.

MR. LOUCKS: Your Honor, for the record, the United States opposes any downward departure on the basis of any alleged disparity in sentencing. We don't know what the sentence is yet for Mr. Thurston, but any disparity in treatment.

There are – the Courts frown on departures downwards based upon that, and there are an incredible number of reasons here that distinguish Mr. Thurston from Mr. Isola.

Firstly and foremost, Mr. Isola never pled to anything with respect to the Ferritin addition to the lab [78] scan. Mr. Isola's –

THE COURT: That was because subsequent to the indictment that there was an information that charged those offenses not relating to Ferritin.

MR. LOUCKS: Right, the Apolipoprotein additions.

THE COURT: Right. So that was, I think that was, my impression was that was done as a means of a plea bargain.

MR. LOUCKS: But the crime condition for Mr. Isola is a crime relating to the addition of the Apolipoproteins, not the Ferritins, and that conduct took place in 1989.

THE COURT: But that was because of a plea bargain understanding. The fact, though, is that one was the president and the other is the vice-president, that's the fact, and they both were there over the entire time, so address that, I mean that's the real point.

MR. LOUCKS: You indicated before our break that you thought Mr. Isola was the prime architect.

THE COURT: In this way he was the president, he had to be the man in charge.

MR. LOUCKS: Simply being the president isn't sufficient proof that a person is involved in criminal activity.

THE COURT: Well, he obviously was involved in criminal activity because he was charged and he pled.

[79] MR. LOUCKS: He was charged and he pled and admitted willful blindness as to the Apolipoprotein addition to the coronary risk profile. He did not admit and plead to any conduct related to the Ferritin tests.

THE COURT: Let met ask you this, am I wrong, wasn't that the same proposition provided this defendant that he had pled? I mean am I wrong there? Namely, is it true or isn't it that this individual –

MR. LOUCKS: Well, your Honor –

THE COURT: Let me ask the question. Was the same proposition afforded this defendant, namely, if he pled guilty or pled nolo contendere he would have got a probationary sentence?

MR. LOUCKS: Your Honor, we never made any representation that the Court would give a probationary sentence on a nolo contendere plea. We always opposed a nolo contendere plea. We don't have any control over what the Court imposes as a sentence. The only power we have is to choose to appeal or not appeal. We did say to this defendant that we wouldn't appeal a sentence imposed if he pled guilty.

THE COURT: Are you telling me that that sentence in that case was a shock to the government, is that what you're telling me now?

MR. LOUCKS: No, I'm not saying that sentence was [80] a shock to the government.

THE COURT: My question is, was he offered the same deal as Isola was?

MR. LOUCKS: Your Honor, we discussed with his counsel a plea along the lines to an information similar what Isola pled to.

THE COURT: If that's so, it was the, and it is so, they both were involved to the same extent only Isola was the president.

MR. LOUCKS: But, your Honor, from the very beginning of this case I have consistently said to all counsel involved that the evidence of proof, or the evidence

of Mr. Thurston's involvement in activity is far, far more substantial than the evidence of any other defendant.

Your Honor, I want to say this with respect to Mr. Thurston's testimony and Mr. Isola's testimony. You indicated before the break that Mr. Isola was the prime architect of the criminal activity. Mr. Isola denied that when he testified, he said on that stand. Mr. Thurston –

THE COURT: What's nolo contendere?

MR. LOUCKS: That's willful blindness.

THE COURT: Whatever. He pled guilty.

MR. LOUCKS: Well, another big distinction between the two, your Honor, is this, is that there was no instruction to this jury at the time of the trial on the [81] willful blindness. This case was not tried on a theory of willful blindness.

THE COURT: Let me ask you this: Is there any difference between Isola and this defendant, in your view?

MR. LOUCKS: Yes.

THE COURT: Is there involvement in this criminal conspiracy?

MR. LOUCKS: Yes.

THE COURT: Then why was the same deal offered to both of them? Why was the same deal made to both of them? I'm not here to argue the Isola case up, I merely said it's being used as a guideline, but if you're going to go in and tell me that Isola is substantially different than this defendant, then I don't believe you.

MR. LOUCKS: Well, your Honor, can I respond? First of all, I think this defendant lied at his trial, that is a substantial difference. At the time of Mr. Isola's sentencing, he had not testified under oath, anywhere denied any role in any criminal activity. When Mr. Isola testified here, he denied any corporate plan to add Ferritin, as did this defendant. For the Court to conclude that Mr. Isola was the architect of this defendant's crime, which is the addition of Ferritin to the lab scan, not Apolipoprotein to the coronary risk profile but the addition of Ferritin to the lab scan. The Court has to conclude that Mr. Isola lied [82] and that Mr. Thurston was a liar.

THE COURT: Let me ask you this, are you telling me that Isola didn't know what he was doing with respect to the Ferritin addition? Is that what you're telling me?

MR. LOUCKS: The evidence that came in this case –

THE COURT: I'm asking you, are you saying that he didn't, notwithstanding the fact that he pled only to one aspect of this scheme, is it your position that Isola had no understanding of or no involvement in adding Ferritin to the voucher?

MR. LOUCKS: Your Honor, can I answer it this way?

THE COURT: No, I'd like you to answer the question, whatever way you wish.

MR. LOUCKS: Well, I'm not ducking the Court's question, okay, but I want to say this, that whatever my own personal opinion is not material, what is material is what was the evidence presented at the trial. The evidence

presented at the trial in this case was that Mr. Thurston directed the addition of the Ferritin. Mr. Isola sat on the stand and denied any corporate role as did Mr. Thurston. Do I personally think Mr. Isola was involved in the decision making in this company? Yes, but that's not what was proven.

THE COURT: It seemed to me that it was proven. [83] He was there at most of the important meetings.

MR. LOUCKS: Well, then, if it was proven that he was involved in the Ferritin addition to the lab scans, then both he and Mr. Thurston lied about it in their testimony, and that is the basis for treating Mr. Thurston differently than Mr. Isola. Mr. Isola's lies, if he lied during the trial in this case, and I'm not saying he did, okay, Mr. Isola lies came well after any sentencing by him, at this point the United States would have to make a charging decision on whether Mr. Isola should be prosecuted for any perjury he committed in Mr. Thurston's trial.

Mr. Thurston's lies came to the jury which the jury rejected. Now if you look at the sentencing guidelines for perjury, the sentencing guidelines for perjury are 12 or 6 less, and then you go to the accessory, 12 or go to accessory after the fact. Accessory after the fact says 6 less than the underlying offense. The underlying offense here is 26 points, so the perjury guideline for Mr. Thurston is 20 points.

THE COURT: So what is your recommendation?

MR. LOUCKS: Well, my recommendation, your Honor –

THE COURT: And in view of my original question, would Isola be a president of Damon and his receiving, with no opposition from the United States, a term of three years [84] probation, what do you believe is the fair sentence to be imposed on this defendant who was the vice-president?

MR. LOUCKS: Well, your Honor, I went and looked at departure downwards and levels of departure downwards because I think those are our guide, and I look at level of departure downwards in cases involving charitable works, good works, and I couldn't find over the last several days and today any departure greater than three levels downward.

THE COURT: How about on disparity?

MR. LOUCKS: On disparity, your Honor, I will read to you what I found in a case from February 6, 2001, the 11th Circuit. I'm reading at Pages 1325 and 1326, and it's 240 F. 3d 1321. And I'll read the whole paragraph.

> "Finally, Ruggiero argues that the district court's disparate treatment of her and her codefendant, Perez, violates the sentencing guidelines. specifically, she claims that the district court's failure to consider a 5K2.7 departure for Perez indicates that the court's decision to impose upward departure was based on emotion, not on the facts of her case. Ruggiero also claims that this disparate treatment violates the principle of uniformity of sentencing that animates the guidelines."

[85] And the 11th Circuit concludes as follows:

> "We disagree. Disparity between the sentences imposed on a codefendant is generally not an appropriate basis for relief on appeal."

And it cites a prior 11th Circuit case.

> "As we explained in Chodhus, quote, 'to adjust the sentence of one codefendant in order to cure an apparently unjustified disparity between defendants in an individual case will simply create another wholly-unwarranted disparity between the defendant receiving the adjustment and all similar offenders in other cases', closed quote."

And, your Honor, this was a $5 million intended loss on the Medicare program. That case also looked at whether, and found in a case involving a loss to the Medicare program of $15 million, that was a basis for a departure upward because it's interference with –

THE COURT: Let's get right down to the nubbles. It's my understanding that the sentence imposed against Isola was not opposed by the United States.

Two, the same deal was offered to this defendant. This defendant went to trial. We're in a position that the [86] government is asking, the first point, for 78 months for this defendant who went to trial and three years, in essence, probation for one who pled. That's a disparity. I'm asking you, in your judgment, what recommendation you can give me, what do you think I should do, that's the issue.

MR. LOUCKS: And, your Honor, I think that the Court should, at a bare minimum, sentence Mr. Thurston to the applicable perjury guidelines for his lies during his testimony at the trial of this case, something that Mr. Isola did not and had not done at the time of his sentencing.

THE COURT: Are you saying that Isola testified falsely in this case?

MR. LOUCKS: No. Mr. Isola's testimony happened well after his sentencing.

THE COURT: But are you saying he testified falsely in Thurston's case?

MR. LOUCKS: I think Mr. Isola, I think, based on what the Court concluded, that that conclusion can be drawn, that Mr. Isola, when he denied any corporate plan, was not testifying truthfully. Mr. Thurston denied any corporate plan. All of the managers who reported to him said that it was Mr. Thurston –

THE COURT: You're asking me now to sentence –

[87] MR. LOUCKS: I'm not.

THE COURT: – two defendants who haven't been charged on the basis of perjury?

MR. LOUCKS: No. I am asking and stating, and we said in our moving papers that this Court should apply an enhancement to Mr. Thurston's sentence for his lies during his testimony at trial. We have always asked for that.

THE COURT: What's your recommendation here? I've already ruled that the so-called bench level is 26.

MR. LOUCKS: Right. And I recommend this. Well, we oppose any departure. We oppose any reduction or any departure. But I think that the Court should not depart any further down than the perjury guidelines that

would apply as to Mr. Thurston's perjury in the trial in this case.

THE COURT: And what is that?

MR. LOUCKS: Well, that's a 20, and the range is 33 to 41.

THE COURT: All right, I'll hear counsel.

MR. RUSSONIELLO: Thank you, your Honor.

In the first place, I think the Court in it's calculation of Offense Level 26 has rejected the notion that there was perjury on the part of the defendant Thurston here, I think the Probation Department correctly said that rather than take the government's view of what it thinks were the three things that were testified to by Mr. Thurston [88] that were false, that it was up to the Court to make that judgment, because the Court had the opportunity to observe his demeanor, the Court heard his testimony, and the Court is in a better position than probation to be able to make that judgment. The Court has made that finding, that there was no, in effect there was no obstruction of justice, there was no testifying falsely. Witnesses often perceive things differently.

The fact, as I've explained earlier, the fact that Mr. Thurston has insisted that he did not intend to deceive or trick the doctors, that he did not intend to conceal in any way the manner in which the Ferritin was being added to lab scan, that he did not direct that the advertising be done in such a way as to conceal that there was a choice to add Ferritin. All of these things are in our brief substantiated as true. It is not the case that the jury necessarily had to, had to find he had lied in order to find him guilty because the government's theory of the case was that Mr.

Thurston joined the conspiracy when he signed off on the CERs.

Mr. Isola signed off on the CERs. Mr. Isola attended the same P2 meeting that Mr. Thurston attended where the same discussion took place about this so-called revenue enhancements in order to offset Medicare losses.

The idea that the Court should take into account [89] Mr. Thurston's perjury now, he's not been charged with it, he's not been convicted of it, but that the Court should find that he lied, and then in finding that he lied, impose a substantial sort of penalty for something which is neither proved, charged nor proved, seems to me is inappropriate.

The Isola involvement in this was at first that he managed both, oversaw both components of the single-count conspiracy, manipulated the Apo, manipulated the Ferritin.

The government chose to file an information. The government made a judgment, on the basis of no hearing, no evidence, that it would file a single allegation in an information alleging only the Apo and not the Ferritin. Now, did it do that because it considered the Ferritin case to be weaker? No. The government now says the Ferritin case was stronger, the government says the case against Mr. Thurston was a stronger case.

We're not talking about the probity of the evidence, we're talking about the relevant culpability of participants in the crime. That is what disparity in sentencing, that is what the, that is what the guideline is designed to address, it's not whether or not one is more likely to be convicted than another, it is the question of in the scheme of things, which is the person of several who had the

greater involvement, both in terms of certainly benefit to be derived? Mr. Isola. Overall management [90] responsibility? Mr. Isola. Ability to direct a greater number of persons? Certainly Mr. Isola. Force of personality? Mr. Isola, very persuasive sort of person. And vis-a-vis, Mr. Thurston, clearly a person of greater culpability for the $16 million the government from the outset claimed was the, was the sum derived from the Ferritin effort.

Now, it chose to abandon that for whatever reason. It now, as I suggested earlier this morning, the only reason that they can come up with for suggesting that Mr. Thurston should not be punished for having a jury trial is that he lied and that there was some concealment. Those are the only two grounds for suggesting that he should be treated differently.

We have taken a great amount of the Court's time today and we spent a lot of time in the brief addressing the so-called false statement issue, and I just say finally that it is not necessarily the case that the jury had to disbelieve him, find him to be lying in order to find him to be guilty under the conspiracy as it was charged.

And so, you know, I submit that given that in terms of relative culpability, Mr. Isola has always been considered to be more responsible. He was the person who was first named in the indictment. He was the person who was considered to be the, in a sense, the manager of this [91] company for all of this time period. And the fact that the government, for whatever reason, made a proposal to him and then chose to stand by quietly while a perfunctory sentence was imposed suggests that Mr. Thurston's sentence in the case should be no greater.

THE COURT: Any quick?

MR. LOUCKS: Yeah, just quickly, your Honor.

The Court heard testimony from Mr. Bryant, the office manager in Newbury Park. Mr. Bryant admitted engaging in acts that were trickery. The government determined in the course of the investigation to extend to him immunity as a judgment by the executive branch. That that individual who was culpable in this activity was not prosecuted does not mean and is, I think, not relevant to any sentence to be imposed on Mr. Thurston. The government often takes action in cases to plea bargain with defendants where it is a question of proof that the government can in fact meet its proof in a case. We did meet our proof in this case as to this defendant. This defendant did testify that he was not involved with criminal activity and the jury rejected that. I don't think it's relevant at all what discussions we may have had with this defendant about any potential plea prior to trial, and I don't think it's pertinent for the Court to make a 18-level departure downward, as the defendant suggests, and impose a sentence [92] of probation on this individual, from an offense level of 26 down to 18 just should not happen.

MR. RUSSONIELLO: This is a bed that the government made, this is a bed that the government made when it entered into the plea with Isola. It basically said to us, it said, this is the frame of reference for this case, and now it suggests that it's not a frame of reference, that it's irrelevant. I submit that the only reason that it's irrelevant is because the government is unhappy with the way that that particular venture is now being thrown back in its face.

Every bit of evidence that was admissible in this case – And Isola, by the way, was a named coconspirator when

we went to trial, it was not one of these things that Isola was sort of found to be uninvolved in Ferritin. When we started the trial in this case, we asked for the names of those persons, both named in the indictment and otherwise, and Isola was one of the named defendants who stayed a named coconspirator in the case. And so there was always the suggestion by the government that Isola's involvement in the Ferritin aspect of the case was at least as great if not greater than Mr. Thurston's. So they should not be permitted to duck what they chose to do with respect to him in trying to justify what is an extreme sentence for Mr. Thurston.

[93] THE COURT: I'll hear from Mr. Thurston.

MR. RUSSONIELLO: Right here?

THE COURT: Sure.

THE DEFENDANT: Thank you, your Honor. I think there are several things that I would briefly like to talk about.

First of all, I think it's important for me to recognize and in fact apologize for the amount of time and effort that has been expended on this trial. We talked about the offer that was extended to me to plead nolo such as Mr. Isola did, and I rejected that offer. I rejected that offer because I believed that the truth would be known at trial and that as a result of that I would not be convicted. That didn't turn out that way, I understand that now, and to a certain extent I feel badly that I expended that time and effort and did not accept what was offered to me prior to trial.

I would like also to speak briefly, since we have talked about it a lot today, about the issue of false testimony at trial. Excuse me. I have had throughout my adult life a

principle of honesty. I believe that that has been borne out by the letters which have been written.

THE COURT: There's no doubt you've had, as I've indicated, an exemplary life.

THE DEFENDANT: For me, having had and still have [94] that principle of honesty, which I learned from my parents, for me to violate that honesty by saying something that isn't true in order to get off the hook, so to speak, it's not in me. Those who know me well, some of them are here, my family members and friends and associates at Damon, if I were to say something like that, it would violate the very thing for which they have held me in high esteem. I couldn't do that.

So what is the truth? The truth is that there wasn't really a conspiracy, there was a business decision to add a test to a panel of tests for several reasons, one of which was to get additional revenue, I testified to that at trial. One of which was to offset Medicare reductions, I testified to that at trial. And one of them was to meet competition because all of the other laboratories had already added tests to their panels, and without that, we would have been at such a serious competitive disadvantage that we might have been out of business. We weren't leading that effort, we were following it. There was plenty of evidence at trial that shows that we were a follower, not a leader.

Did we do it in a way that was intended to trick the doctors? No. We certainly did it in a way which was competitive, in a competitive business environment, but I had no feeling inside me that said what I am doing is [95] against the law. It turns out that when, when the government began to look at this, they began to view it that way. And so if I, if I play Monday morning quarterback, I can

look back and say, Yeah, maybe that, I shouldn't have done that that way, I wish I had known that at that time. But I do accept responsibility for the things which I did and I have never denied the responsibility for the things which I did. And I place that, I think, on record and it's in the court documents.

Now, you know, the trial didn't end the way I thought it would. That does not – that does not change my belief in the American system, I'm still proud to be an American and I will continue to be proud of the American system and the American system of justice.

Now, I would like to take a minute and offer some expression of appreciation first to those who have represented me here, Mr. Wall, for many years, I appreciate it. And Mr. Russoniello and Mr. Wall, or Matt Brown who stepped in, really, at the last minute because of the illness on the part of Mr. Wall, had picked up the flag and I think waived [sic] it proudly and rightfully, so thank you to them.

I want to publicly thank those also who wrote letters on my behalf. Most of them were not solicited, a few were, maybe five or six, the rest came at their own [96] desire.

And finally I owe a deep expression of appreciation to my family, several of them, also my siblings, all but one are here today at their own expense to provide support. Two of my four sons are also here. And I would be remiss if I did not express my eternal appreciation for the most loving spouse who has stood by my side and knows me better than anyone and who has been my chief supporter.

Now, my attitude going forward, whatever the sentence may be. I admit and I know Mr. Wall remembers

that at the beginning I had somewhat of a why me attitude. I have learned over time that that why me attitude was really a feeling of resentment and that isn't what I want. And so what I have tried to do is change my attitude from why me to what is required of me, and whatever that will be, that will be my commitment to fulfill whatever is required.

Perhaps the feeling of resentment is best replaced with an opportunity for growth and perhaps service. Perhaps I can paraphrase that by saying that I'm willing to accept the bitter cup without becoming bitter myself, that's my goal.

I thank the Court for your attention and all of the others who I've failed to mention who I'm sure have spent much time and effort finding the right thing, and I [97] submit myself to the Court.

Thank you.

THE COURT: I'm going to impose the following sentence. So the record is clear, that I'm using the sentence imposed against Mr. Isola as the guideline, and taking into consideration the defendant's extraordinary contributions and service to society, and especially to his religious obligation, I'm going to impose the following sentence:

A term of imprisonment of three months with the judicial recommendation that said sentence be served in a halfway house. Supervised release for 24 months with the special condition that the first three months of supervised release be served in home detention. No fine. $100 special assessment. A special condition of supervised release in addition to that already specified is that defendant is

prohibited from possessing a firearm or other dangerous weapon. The defendant is allowed to voluntarily surrender at the institution designated by the Bureau of Prisons, said designation to be made on or before July 29, 2002.

* * *

MOTION FILED
SEP 8 - 2004

No. 03-1670

In The
Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza,
20th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

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MOTION TO AMEND PETITION FOR A WRIT OF CERTIORARI

Eight days after William Thurston filed a petition for a writ of certiorari in this case, this Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a criminal sentence imposed under Washington state law violated the Sixth Amendment to the extent it was based on facts found by a judge rather than found by a jury or admitted by the defendant. In the wake of *Blakely*, the Court recently granted certiorari and ordered expedited briefing in *United States v. Booker*[1] and *United States v. Fanfan*[2] to decide whether the Sixth Amendment is likewise violated by imposition of an enhanced sentence under the United States Sentencing Guidelines.

Thurston's case presents the same question as *Booker* and *Fanfan*. His sentence was enhanced by twenty offense levels under the federal Guidelines based on judge-determined facts regarding the amount of intended loss associated with a conspiracy to defraud the United States, the extent of the planning associated with the conspiracy, and Thurston's role in the offense.

This case would also present a different but related Sixth Amendment question even if the Court were to reject the Sixth Amendment challenges raised in *Booker* and *Fanfan*. Through the operation of the PROTECT Act's[3] new departure-restricting provisions, as well as the First Circuit's failure to afford the breadth of departure discretion required

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[1] *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, No. 04-104, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004).

[2] *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (partial tr. of sentencing hr'g), *cert. granted before judgment*, No. 04-105, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004).

[3] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

by *Koon v. United States*, 518 U.S. 81 (1996), Thurston was subjected to a scheme more akin to determinate sentencing. The question therefore arises whether the Sixth Amendment is offended by a system that requires a judge to find facts and impose sentence enhancements, yet simultaneously eviscerates that judge's discretion to depart to reach a just, individualized sentence.

The certiorari petition as originally filed did not include these questions because, before *Blakely*, this Court had rejected constitutional challenges to the Guidelines, and the circuit courts uniformly had rejected *Apprendi*-based challenges to the Guidelines. Accordingly, Thurston moves for leave to amend his certiorari petition by the Amendment bound herewith, in which these additional questions are presented.

This case is scheduled for the Court's consideration at its conference on September 28, 2004.

BACKGROUND

Thurston was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and sentenced in June 2002 under the federal Guidelines. The base offense level for this crime was six. Based on facts found by the judge under a preponderance-of-the-evidence standard, not by the jury under a reasonable-doubt standard, Thurston's sentence was increased by twenty levels:

> This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

Pet. App. 203a-204a.[4] Based solely on the jury's general verdict of conspiracy to defraud, the applicable guidelines range would be zero to six months' imprisonment. *See* U.S.S.G., Sentencing Table. Once the district court imposed the enhancements, however, Thurston's sentence increased to a range of sixty-three to seventy-eight months' imprisonment, *see id.*, capped by 18 U.S.C. § 371 at sixty months. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 371; 28 U.S.C. § 994(b)(1).

Thurston challenged each of these factual findings and attendant offense-level enhancements in the district court, and the fourteen-level intended-loss enhancement on appeal. Thurston's App. in 1st Cir. 1502-1520 (objections to presentence report); Gov't App. in 1st Cir. 117-125 (sentencing brief); *id.* 318-348 (oral argument at sentencing); Thurston's Opening Brief in 1st Cir. 78-84; Thurston's Reply Brief in 1st Cir. 58-61. Given the controlling authority at the time of trial, sentencing, and appeal, well before *Blakely* was decided, Thurston did not interpose a Sixth Amendment challenge to the sentencing enhancements. The sentencing judge departed downward on two grounds from offense level twenty-six to level ten, Pet. App. 212a-213a, 233a-234a, but the First Circuit reversed the departure on both grounds, remanding for imposition of the statutory maximum sentence of five years' imprisonment.

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[4] The base offense level and enhancements correlate to the following provisions of the Guidelines: United States Sentencing Commission, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (providing base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (providing base offense level for fraud is six); *id.* § 2F1.1(b)(1) (providing for fourteen-level increase for "loss" greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (providing for two-level increase "[i]f the offense involved [] more than minimal planning"); *id.* § 3B1.1(a) (providing for four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The November 1992 Guidelines were used to avoid retroactivity problems.

Id. 63a-64a. Thurston filed a petition for rehearing, which the court of appeals denied on March 18, 2004. *Id.* 134a.

On June 16, 2004, Thurston timely filed his certiorari petition in this Court. Thurston's original petition, which is scheduled for consideration at this Court's conference on September 28, 2004, presents the following questions:

> 1. Whether applying the PROTECT Act to a case pending on appeal on the date of enactment contravenes statutory construction, retroactivity, and *ex post facto* doctrines.
>
> 2. Whether *de novo* review to determine whether a departure is "justified by the facts of the case" (a) is limited to consideration of extra-record sources that the district court is entitled to consider, and (b) requires affording weight to the district court's experience, expertise, and unique vantage point in sentencing.
>
> 3. Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial.

Petition For a Writ of Certiorari at i.

Eight days after Thurston filed his certiorari petition, the Court decided *Blakely v. Washington*, 124 S. Ct. 2531. On August 2, 2004, the Court granted certiorari in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, to decide whether the reasoning of *Blakely* means that the sentence-enhancement provisions of the federal Guidelines violate the Sixth Amendment.

Thurston seeks to amend the petition to add the following questions:

> 4. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based

> on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 5. If the answer to the question above is not an unequivocal "yes," the following question is presented: Whether imposition of such an enhanced sentence violates the Sixth Amendment when the sentencing judge's fact-intensive decision to depart from the applicable guideline range is subject to nondeferential *de novo* review, or when the sentencing judge is prohibited by law from departing based on a disparity between the sentences of similarly situated co-defendants.

Amendment to Petition For a Writ of Certiorari, bound herewith, at i. The first question is identical to the first question presented in *Booker* and *Fanfan*. The second question would arise in this case even if the Court were to reject the Sixth Amendment challenges raised in *Booker* and *Fanfan*.

ARGUMENT

Whether to grant leave to amend a timely petition for certiorari is not a jurisdictional question, but rather a matter within this Court's discretion, considering all the circumstances. Bennett Boskey, *Supreme Court*, *in* 1 West's Federal Forms § 142 (4th ed. 1992); *see also* Sup. Ct. R. 21 (providing for motions to the Court). The Court has allowed such amendments to petitions, including in cases in which certiorari was granted. *See, e.g.*, *Hall v. Texas*, 536 U.S. 955 (2002); *Paris Adult Theatre I v. Slaton*, 408 U.S. 921 (1972); *Alderman v. United States*, 394 U.S. 165 (1969) (Court granted motion to amend petition to raise issue similar to that presented in another case before Court); *Bates v. Nelson*, 393 U.S. 16 (1968) (per curiam) (concurrent with grant of motion to amend and of petition, Court vacated judgment and remanded case for further consideration in light of recent decisions by Court in other cases); *Continental Oil Co. v. Federal Power Comm'n*, 388

U.S. 906 (1967); *Costello v. United States*, 365 U.S. 265, 284 (1961); *Slusser v. Ellis*, 344 U.S. 807 (1952); *cf. also Northeast Bancorp, Inc. v. Bd. of Governors of Federal Reserve System*, 472 U.S. 159, 176-77 (1985) (exercising discretion to decide issue first raised in supplemental brief after being abandoned in certiorari petition and merits briefs).

This case presents compelling circumstances that favor allowing Thurston to amend his petition to add the identical question presented in the *Booker* and *Fanfan* cases, as well as a different but related Sixth Amendment question. The first Sixth Amendment question is squarely presented by this case, just as it is in *Booker* and *Fanfan*. At sentencing, the judge enhanced Thurston's sentence by twenty levels under the Guidelines: fourteen levels for "intended loss," two levels for "more than minimal planning," and four levels for "aggravating role in the offense." Pet. App. 203a-204a. *See supra* at 2-3 & n.4. These facts were not found by a jury beyond a reasonable doubt, nor were they admitted by Thurston. Instead, they were found by the judge under a preponderance-of-the-evidence standard. Thurston contested these enhancements—in his objections to the presentence report, in his sentencing brief, during oral argument at sentencing, and on appeal. *See supra* at 3. Not only was Thurston's sentence enhanced in the first instance, but the sentencing judge's downward departure, which offset sixteen of the twenty levels of enhancements, was reversed by the court of appeals under a nondeferential *de novo* review standard that the court interpreted the PROTECT Act to require. Thus, the second Sixth Amendment question would be presented here even if the Court rejected the Sixth Amendment challenges made in *Booker* and *Fanfan*.

Blakely represented "a sea change in the body of sentencing law," *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004), and, absent leave to amend, Thurston will be prejudiced by unfortunate timing that was completely beyond his control. Thurston filed his certiorari

petition on June 16, the last day he could do so under this Court's Rule 13. Sup. Ct. R. 13.1, 13.3 (certiorari petition must be filed within 90 days of court of appeals' denial of petition for rehearing); *see also* Sup. Ct. R. 13.5 ("An application to extend the time to file a petition for a writ of certiorari is not favored."). Eight days later, on June 24, the Court decided *Blakely*. 124 S. Ct. 2531. The Court revisited the rule it had announced in *Apprendi*: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). The Court held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

124 S. Ct. at 2537 (emphasis in original) (internal citations omitted). One court has stated that "*Blakely* redefined 'statutory maximum.'" *Booker*, 375 F.3d at 514; *see also Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (explaining the "[u]nder the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense" and "must now be charged in an indictment and submitted to a jury").

As Justice O'Connor correctly noted, "there is no map of the uncharted territory blazed by [the Court's] unprecedented holding" in *Blakely*. *Id.* at 2547 n.1 (O'Connor, J., dissenting). Despite the fact that the Court in *Apprendi* expressly declined to discuss the federal Guidelines, 530 U.S. at 497 n.21, shortly after that decision, defendants argued that enhancements under the Guidelines based on a judge's factual findings violated the Sixth Amendment. Every court of appeals with criminal jurisdiction rejected

that argument in the year or two after *Apprendi*,[5] and reaffirmed that position after this Court applied the *Apprendi* rule in *Ring v. Arizona*, 536 U.S. 584 (2002).[6]

For example, the First Circuit, the court that heard Thurston's appeal, had concluded by early 2001 that

> *Apprendi* simply does not apply to guideline findings (including, inter alia, drug weight calculations) that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum. In other words, even after *Apprendi*, the existence *vel non*

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[5] *See, e.g.*, *United States v. Caba*, 241 F.3d 98 (1st Cir. 2001); *United States v. Norris*, 281 F.3d 357 (2d Cir. 2002); *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001); *United States v. Mack*, 229 F.3d 226 (3d Cir. 2000); *United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000); *United States v. Tarwater*, 308 F.3d 494 (6th Cir. 2002); *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000); *United States v. Diaz*, 296 F.3d 680 (8th Cir. 2002); *United States v. Ochoa*, 311 F.3d 1133 (9th Cir. 2002); *United States v. Jackson*, 240 F.3d 1245 (10th Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000); *United States v. Fields*, 251 F.3d 1041 (D.C. Cir. 2001).

[6] *See, e.g.*, *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004); *United States v. Goodine*, 326 F.3d 26 (1st Cir. 2003); *United States v. Luciano*, 311 F.3d 146 (2d Cir. 2002); *United States v. Parmelee*, 319 F.3d 583 (3d Cir. 2003); *United States v. Cannady*, 283 F.3d 641 (4th Cir. 2002); *United States v. Floyd*, 343 F.3d 363 (5th Cir. 2003); *United States v. Randle*, 304 F.3d 373 (5th Cir. 2002); *United States v. Helton*, 349 F.3d 295 (6th Cir. 2003); *United States v. Merritt*, 361 F.3d 1005 (7th Cir. 2004); *United States v. Johnson*, 335 F.3d 589 (7th Cir. 2003) (per curiam); *United States v. Banks*, 340 F.3d 683 (8th Cir. 2003); *United States v. Piggie*, 316 F.3d 789 (8th Cir. 2003); *United States v. Toliver*, 351 F.3d 423 (9th Cir. 2003); *United States v. Mendez-Zamora*, 296 F.3d 1013 (10th Cir. 2002); *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003); *United States v. Pettigrew*, 346 F.3d 1139 (D.C. Cir. 2003); *accord Blakely*, 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting) (collecting federal and state authority, and explaining that "[p]rior to today, only one court [the Kansas Supreme Court, reviewing Kansas state law] had ever applied *Apprendi* to invalidate application of a guidelines scheme").

> of sentencing factors that boost a defendant's sentence but do not trip a new statutory maximum remain grist for the district judge's mill under a preponderance-of-the-evidence standard.

United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001) (citations omitted) (holding *Apprendi* not violated where sentence enhanced based on judge's finding of drug quantity, which defendant was acquitted of possessing, and finding that defendant was "organizer or leader" of conspiracy). Because a court is prohibited from imposing a Guidelines sentence that exceeds the maximum provided by statute for the offense of conviction, U.S.S.G. § 5G1.1(a); 28 U.S.C. § 994(b)(1), this reasoning effectively meant that no judicial fact-finding in the application of the Guidelines could ever be successfully challenged on *Apprendi* grounds. Well before Thurston was tried or sentenced, the First Circuit had already rejected such *Apprendi*-based challenges to Guidelines calculations "on numerous occasions" and made clear that "[its] jurisprudence on this point has been well-established." *United States v. Campbell*, 268 F.3d 1, 7 & n.7 (2001); *see also United States v. Goodine*, 326 F.3d 26, 33 (1st Cir. 2003) ("Nothing in *Apprendi* or subsequent cases calls into question the validity of the Sentencing Guidelines, and we do not believe that the Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue.") (internal quotation marks and citation omitted).

In addition to the circuit courts' uniform precedent rejecting *Apprendi*-based, Sixth Amendment challenges to the Guidelines, this Court had, by the time of Thurston's trial and sentencing, considered and rejected a number of constitutional and other challenges to sentences imposed under the Guidelines, none of which suggested the Guidelines' demise. *See, e.g.*, *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Watts*, 519 U.S. 148 (1997) (per

curiam); *Witte v. United States*, 515 U.S. 389 (1995); *United States v. Dunnigan*, 507 U.S. 87 (1993).[7]

Given the controlling authority at the time he filed his petition, before *Blakely*, Thurston reasonably did not present the question of whether his sentence was imposed in violation of the Sixth Amendment. But now, *Blakely*'s reasoning gives rise to a straightforward argument that Thurston's sentence violated his right to trial by jury. The Court should afford him the opportunity to make this argument while his case is still on direct review.

The fact that Thurston did not mount a Sixth Amendment challenge in the district court or court of appeals before *Blakely* poses no obstacle to this Court's allowing amendment of the petition. This Court's constitutional decisions, including those announcing new rules, apply retroactively to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Although the Court normally does not review an issue not pressed or passed on below, in exceptional cases, it will. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540-41 (1999) (resolving legal standard although court below did not reach issue); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (deciding question not pressed, although decided, below, because the issue was "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law") (internal quotation marks and citations omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (deciding question of law even though not addressed by lower court); *Nixon v.*

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[7] The government has taken the position that "[t]his Court could not hold that *Apprendi* applies to the Guidelines without disavowing *Edwards*, as well as *Watts*, *Witte*, and *Dunnigan*, and saying that the Court has 'recently discovered a constitutional principle rendering unconstitutional all the sentencing practices affirmed in those decisions.'" Nos. 04-104, 04-105, Brief for the United States at 38 (quoting *United States v. Emmenegger*, No. 04 CR. 334 (GEL), 2004 WL 1752599, at *11 (S.D.N.Y. Aug. 4, 2004)).

Fitzgerald, 457 U.S. 731, 743 n.23 (1982) (same); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding question not pressed or decided in district court or court of appeals, because "[i]t [was] an important, recurring issue and [was] properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits").

Whether this issue in this case will ultimately be reviewed under a harmless-error or a plain-error standard should not affect the ruling on this motion. Even if Thurston were deemed to have forfeited this claim of error in the courts below,[8] this Court could allow the petition to be amended, and ultimately grant certiorari. The Court has overlooked the plain-error rule and reached the merits when confronted with a question that is "currently in a state of evolving definition and uncertainty[,] . . . is important[,] and appears likely to recur." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981) ("conclud[ing] that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration"). Moreover, even when a party does not successfully move to include a question in the certiorari petition, "the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to

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[8] Thurston does not concede forfeiture in the circumstances presented here. He strongly objected to and thoroughly argued against the twenty-level sentence enhancements under U.S.S.G. §§ 2F1.1(b)(1), 2F1.1(b)(2), and 3B1.1(a) before they were imposed. The government has taken inconsistent positions on whether failure to object in the district court on *Apprendi* grounds constitutes forfeiture in similar circumstances. *Compare Booker*, 375 F.3d 508, 515 (7th Cir. 2004) (because government did not argue forfeiture, court did not consider application of the plain-error doctrine) *with United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12 (6th Cir. Aug. 26, 2004) (en banc) (Martin, J., dissenting) (government argued that *Apprendi* claim was forfeited and should be reviewed under plain-error standard).

decide." Sup. Ct. R. 24.1(a). Thurston contends that the sentencing enhancements imposed by the district court constitute plain error under *Blakely*. *See United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12-13 (6th Cir. Aug. 26, 2004) (en banc, 9-5 decision) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting) (concluding that sentence enhancements imposed by district court constituted plain error under *Blakely*, while reserving judgment as to whether harmless-error review is appropriate given that *Blakely* decided subsequent to defendant's sentencing).

Further, there is no risk that the government will be prejudiced by the proposed amendment to the petition. One of the added questions is identical to the Sixth Amendment question being briefed and argued by the government in the *Booker* and *Fanfan* cases. And the other question results from the confluence of the Sixth Amendment principles being briefed and argued there, and the particular sentence enhancements and departure issues already presented by the certiorari petition here.

For these reasons, the Court should grant this motion to amend the certiorari petition. For the same reasons, as well as the reasons set forth in the Amendment bound herewith, the original filed certiorari petition, and the supplemental brief in support of the petition, the Court should grant the petition, including the Amendment. In the alternative, this Court should defer ruling on this motion or the certiorari petition or both until the Court decides *Booker* and *Fanfan*. Then if the Court were to find that, in light of those decisions, this case presents questions worthy of review, the Court could grant certiorari on all or a subset of the questions, concurrently granting this motion if appropriate. If the Court were instead to find none of the questions worthy of briefing and argument, it could nonetheless summarily reverse, or, if appropriate, it could grant, vacate, and remand for reconsideration in the lower courts in light of *Booker* and *Fanfan*. *See* 28 U.S.C. § 2106 ("The Supreme Court ... may affirm, modify,

vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); Sup. Ct. R. 16.1 (providing for "summary disposition on the merits").

CONCLUSION

The motion to amend the petition for a writ of certiorari should be granted. Alternatively, the motion should be held and decided in light of this Court's decisions in the *Booker* and *Fanfan* cases, Nos. 04-104 and 04-105.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza, 20th Floor
San Francisco, CA 94111
(415) 693-2000

Counsel for Petitioner

September 2004

No. 03-1670

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMENDMENT TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza,
20th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

QUESTIONS PRESENTED

In addition to the three questions presented in the original filed petition for a writ of certiorari, this case presents the following questions:

4. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

5. If the answer to the question above is not an unequivocal "yes," the following question is presented: Whether imposition of such an enhanced sentence violates the Sixth Amendment when the sentencing judge's fact-intensive decision to depart from the applicable guideline range is subject to nondeferential *de novo* review, or when the sentencing judge is prohibited by law from departing based on a disparity between the sentences of similarly situated co-defendants.

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* This section of Thurston's original petition contained argument headings I-III, corresponding to the three questions presented. This Amendment continues with headings IV-V, corresponding to the two additional questions presented.

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AMENDMENT TO PETITION FOR A WRIT OF CERTIORARI

William Thurston respectfully amends his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

See the original petition, at page 1.

STATEMENT OF JURISDICTION

See the original petition, at page 1.

CONSTITUTIONAL PROVISIONS INVOLVED

This amendment to the petition involves the Sixth Amendment to the Constitution of the United States, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

In addition to the statement contained in the original petition, at pages 2-7, the following statement is relevant to this amendment to the petition.

The base offense level for violation of 18 U.S.C. § 371, Thurston's crime of conviction, was six. Based on facts found by the judge under a preponderance-of-the-evidence

standard, not by the jury under a reasonable-doubt standard, Thurston's sentence was increased by twenty levels:

> This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

Pet. App. 203a-204a.[1] Based solely on the jury's general verdict of conspiracy to defraud, the applicable guidelines range would be zero to six months' imprisonment. *See* U.S.S.G., Sentencing Table. Once the district court imposed the enhancements, however, Thurston's sentence increased to a range of sixty-three to seventy-eight months' imprisonment, *see id.*, capped by 18 U.S.C. § 371 at sixty months. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 371; 28 U.S.C. § 994(b)(1).

Thurston challenged each of these factual findings and attendant offense-level enhancements in the district court, and the fourteen-level intended-loss enhancement on appeal. Thurston's App. in 1st Cir. 1502-1520 (objections to presentence report); Gov't App. in 1st Cir. 117-125 (sentencing brief); *id.* 318-348 (oral argument at sentencing); Thurston's Opening Brief in 1st Cir. 78-84; Thurston's Reply Brief in 1st Cir. 58-61. Given the controlling authority at the time of trial, sentencing, and appeal, well before *Blakely* was

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[1] The base offense level and enhancements correlate to the following provisions of the Guidelines: United States Sentencing Commission, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (providing base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (providing base offense level for fraud is six); *id.* § 2F1.1(b)(1) (providing for fourteen-level increase for "loss" greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (providing for two-level increase "[i]f the offense involved [ ] more than minimal planning"); *id.* § 3B1.1(a) (providing for four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The November 1992 Guidelines were used to avoid retroactivity problems.

decided, Thurston did not interpose a Sixth Amendment challenge to the sentencing enhancements. The sentencing judge departed downward on two grounds from offense level twenty-six to level ten, Pet. App. 212a-213a, 233a-234a, but the First Circuit reversed the departure on both grounds, remanding for imposition of the statutory maximum sentence of five years' imprisonment. *Id.* 63a-64a.

REASONS FOR GRANTING THE WRIT[2]

IV. This Case Squarely Presents the Sixth Amendment Question This Court Will Decide in *Booker* and *Fanfan* Regarding Sentence Enhancements Under the Federal Guidelines.

1. Eight days after Thurston filed his original petition for a writ of certiorari in this case, this Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a criminal sentence imposed under Washington state law violated the Sixth Amendment to the extent it was based on facts found by a judge rather than found by a jury or admitted by the defendant. Specifically, the Court applied the following rule: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). The Court held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after

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[2] This section of Thurston's original petition contained argument headings I-III, corresponding to the three questions presented. This Amendment continues with headings IV-V, corresponding to the two additional questions presented.

> finding additional facts, but the maximum he may impose *without* any additional findings.

124 S. Ct. at 2537 (emphasis in original).

As Justice O'Connor correctly noted, "there is no map of the uncharted territory blazed by [the Court's] unprecedented holding" in *Blakely*. *Id.* at 2547 n.1 (O'Connor, J., dissenting) (collecting federal and state authority, and explaining that "[p]rior to today, only one court [the Kansas Supreme Court, reviewing Kansas state law] had ever applied *Apprendi* to invalidate application of a guidelines scheme"). One court has stated that "*Blakely* redefined 'statutory maximum.'" *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004), *cert. granted*, No. 04-104, ___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004); *see also Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (explaining that "[u]nder the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense" and "must now be charged in an indictment and submitted to a jury"). Given this "sea change in the body of sentencing law," *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004), the lower courts have been in doubt about whether the federal Guidelines are unconstitutional, and they have reached differing conclusions. *Compare, e.g.*, *Booker*, 375 F.3d 508, and *Ameline*, 376 F.3d 967, *with United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), *petition for cert. filed*, No. 04-5263 (July 14, 2004). In the wake of *Blakely*, the Court recently granted certiorari and ordered expedited briefing in *United States v. Booker*[3] and *United States v. Fanfan*[4] to decide whether the Sixth Amendment is likewise violated by imposition of an enhanced sentence under the United States Sentencing Guidelines.

2. The first Sixth Amendment question (question four in this petition) is squarely presented by this case, just as it

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[3] 375 F.3d 508.

[4] *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (partial tr. of sentencing hr'g), *cert. granted before judgment*, No. 04-105, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004).

is in *Booker* and *Fanfan*. Thurston's sentence was enhanced by twenty offense levels under the federal Guidelines based on judge-determined facts regarding the amount of intended loss associated with a conspiracy to defraud the United States, the extent of the planning associated with the conspiracy, and Thurston's role in the offense. Pet. App. 203a-204a. *See supra* at 1-2 & n.1. These facts were not found by a jury beyond a reasonable doubt, nor were they admitted by Thurston. Instead, they were found by the judge under a preponderance-of-the-evidence standard. Thurston contested these enhancements—in his objections to the presentence report, in his sentencing brief, during oral argument at sentencing, and on appeal. *See supra* at 2.

By granting certiorari in *Booker* and *Fanfan*, this Court has already judged the Sixth Amendment question to be sufficiently important to warrant review. This case presents the identical question, albeit on a different set of facts. Both *Booker* and *Fanfan* are relatively simple drug cases. In *Booker*, the sentence was enhanced based on a finding of drug quantity and obstruction of justice. In *Fanfan*, enhancements for drug quantity and aggravating role in the offense were at issue. In contrast, this is a complex, "white-collar" case alleging conspiracy to defraud the United States where the enhancements were for intended loss, more than minimal planning, and aggravating role in the offense.[5]

3. The fact that Thurston did not mount a Sixth Amendment challenge in the district court or court of appeals before *Blakely* poses no obstacle to this Court's granting certiorari. This

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[5] Thurston petitions for a writ of certiorari on this and another Sixth Amendment question, *see infra* section V. In the alternative, he asks that the petition be held and decided once the Court decides *Booker* and *Fanfan*, at which time summary disposition may be appropriate. *See infra* at 9-10. The questions presented in the original filed certiorari petition—pertaining to the retroactivity and interpretation of the PROTECT Act, the scope of *de novo* review of departures, and the availability of disparity-based departures—continue to be worthy of review by this Court, independent of this amendment to the petition.

Court's constitutional decisions, including those announcing new rules, apply retroactively to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Although the Court normally does not review an issue not pressed or passed on below, in exceptional cases, it will. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540-41 (1999) (resolving legal standard although court below did not reach issue); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (deciding question not pressed, although decided, below, because the issue was "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law") (internal quotation marks and citations omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (deciding question of law even though not addressed by lower court); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (same); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding question not pressed or decided in district court or court of appeals, because "[i]t [was] an important, recurring issue and [was] properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits").

Whether this issue in this case will ultimately be reviewed under a harmless-error or a plain-error standard should not affect the Court's grant of certiorari. Even if Thurston were deemed to have forfeited this claim of error in the courts below,[6] this Court could grant certiorari. The

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[6] Thurston does not concede forfeiture in the circumstances presented here. He strongly objected to and thoroughly argued against the twenty-level sentence enhancements under U.S.S.G. §§ 2F1.1(b)(1), 2F1.1(b)(2), and 3B1.1(a) before they were imposed. The government has taken inconsistent positions on whether failure to object in the district court on *Apprendi* grounds constitutes forfeiture in similar circumstances. *Compare Booker*, 375 F.3d 508, 515 (7th Cir. 2004) (because government did not argue forfeiture, court did not consider application of the plain-error doctrine) *with United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12 (6th Cir. Aug. 26, 2004) (en banc) (Martin, J., dissenting) (government argued that *Apprendi* claim was forfeited and should be reviewed under plain-error standard).

Court has overlooked the plain-error rule and reached the merits when confronted with a question that is "currently in a state of evolving definition and uncertainty[,] . . . is important[,] and appears likely to recur." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256-57 (1981) ("conclud[ing] that restricting our review to the plain-error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration"). Moreover, even when a question is excluded from a certiorari petition, "the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Sup. Ct. R. 24.1(a). Thurston contends that the sentencing enhancements imposed by the district court constitute plain error under *Blakely*. *See United States v. Koch*, No. 02-6278, ___ F.3d ___, 2004 WL 1899930, at *12-13 (6th Cir. Aug. 26, 2004) (en banc, 9-5 decision) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting) (concluding that sentence enhancements imposed by district court constituted plain error under *Blakely*, while reserving judgment as to whether harmless-error review is appropriate given that *Blakely* decided subsequent to defendant's sentencing).

V. This Case Presents an Important Sixth Amendment Issue Involving the Interplay Between Sentence Enhancements and a Sentencing Judge's Discretion to Depart.

1. The second Sixth Amendment question (question five in this petition) is presented by this case because not only was Thurston's sentence enhanced in the first instance, but the sentencing judge's downward departure, which offset sixteen of the twenty levels of enhancements, was reversed on both grounds by the court of appeals under a nondeferential *de novo* review standard that the court interpreted the PROTECT Act[7] to

[7] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

require. This case, distinct from the *Booker* and *Fanfan* cases, therefore raises an important issue involving the interplay between the enhancements to a defendant's sentence and the sentencing judge's discretion to depart from the applicable guideline range.

This issue was suggested by the Brief of *Amici Curiae* An Ad Hoc Group of Former Federal Judges In Support of Neither Party, filed September 1, 2004 in *Booker* and *Fanfan*. There, *amici* argue that sentence enhancements based on judge-found facts under the Guidelines do not violate the Sixth Amendment because sentencing judges have "significant" and "substantial" power to depart from the otherwise applicable guideline range. Brief of *Amici Curiae* at 5-6, 9-10, 13-24. "[T]he federal Guidelines contain sufficient judicial discretion so as not to trigger a defendant's right to a jury trial on any of the many factors that may conceivably increase an individual defendant's sentence." *Id.* at 5-6. The Guidelines system, *amici* argue, "is more analogous to the traditional indeterminate scheme" than to the "determinate statutory sentencing scheme at issue in *Blakely*." *Id.* at 9-10. Directly undermining this argument, however, are the following two problems conceded by *amici*: (1) that restrictions on sentencing judges' departure power wrought by the PROTECT Act "may constitute an unconstitutional restriction on district court discretion in light of *Blakely*" (although the Act is not at issue in either *Booker* or *Fanfan*), *see id.* at 18 n.2; and (2) "some circuit courts of appeal[s] have clearly failed to recognize the breadth of the departure power that *Koon* [*v. United States*, 518 U.S. 81 (1996)] acknowledged and, in those circuits, the Guidelines in effect operate as a determinate scheme," *id.* at 19.

Thurston's case squarely presents the fact pattern in which to test the two Sixth Amendment problems with federal sentencing identified by the former federal judges' *amicus* brief. The First Circuit, in conflict with other circuit courts of appeals' post-*Koon* decisions, declared one ground on which the sentencing judge's departure was based—the disparity between Thurston's sixty-month sentence and a more culpable, non-cooperating co-conspirator's probation-only sentence—to be unavailable as a matter of law. *See* Petition

for a Writ of Certiorari at 6, 21-30. Additionally, the First Circuit reversed on the second departure ground—Thurston's strong record of charitable works and community service, which the sentencing judge found the most extraordinary he had seen in fourteen years of sentencing—after holding the PROTECT Act's *de novo* review provisions applicable, and determining *de novo*, with no deference to the sentencing judge's experience and expertise, that Thurston did not qualify for such a departure. *See id.* at 6-7, 18-21.

In short, through the operation of the PROTECT Act's new departure-restricting provisions, as well as the First Circuit's failure to afford the breadth of departure discretion required by *Koon*, Thurston was subjected to a scheme more akin to determinate sentencing. The Court should grant certiorari to determine whether the Sixth Amendment is offended by a system that requires a judge to find facts and impose sentence enhancements, yet simultaneously eviscerates that judge's discretion to depart to reach a just, individualized sentence.

Thurston's case would present this different but related Sixth Amendment question even if the Court were not to invalidate the sentences in *Booker* and *Fanfan*. Those cases involve sentence enhancements under the Guidelines but not in conjunction with departure decisions. Thus, even if the Court were to hold the application of the Guidelines constitutional in those cases, there remains the issue whether the Sixth Amendment is violated where a judge enhances the sentence based on facts that were not found by a jury beyond a reasonable doubt, in circumstances in which the judge lacks sufficient discretion to depart from the otherwise applicable guideline range.

2. For the same reasons set forth in section IV.3, *supra*, there are no obstacles to the Court's granting certiorari on this question.

For these reasons, as well as the reasons set forth in the motion bound herewith, the original filed certiorari petition, and the supplemental brief in support of the petition, the Court should grant the petition, including this Amendment. In the

alternative, this Court should defer ruling on the certiorari petition until the Court decides *Booker* and *Fanfan*. Then if the Court were to find that, in light of those decisions, this case presents questions worthy of review, the Court could grant certiorari on all or a subset of the questions. If the Court were instead to find none of the questions worthy of briefing and argument, it could nonetheless summarily reverse, or, if appropriate, it could grant, vacate, and remand for reconsideration in the lower courts in light of *Booker* and *Fanfan*. *See* 28 U.S.C. § 2106 ("The Supreme Court ... may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); Sup. Ct. R. 16.1 (providing for "summary disposition on the merits").

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held and decided in light of this Court's decisions in the *Booker* and *Fanfan* cases, Nos. 04-104 and 04-105.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza, 20th Floor
San Francisco, CA 94111
(415) 693-2000

Counsel for Petitioner

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No. 03-1670

In The
Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza,
20th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner William Thurston files this supplemental brief as authorized by Supreme Court Rule 15.8 to bring to the Court's attention two recent decisions that were issued after he filed his petition for a writ of certiorari in this case on June 16, 2004. On June 18, 2004, Chief Judge Young of the United States District Court of the District of Massachusetts issued a sentencing opinion in *United States v. Green*, ___ F. Supp. 2d ___, 2004 WL 1381101 (D. Mass. June 18, 2004), which addressed Thurston's case and, specifically, one of the departure issues presented in his certiorari petition. On June 24, 2004, this Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004), which bears on this case insofar as Thurston's sentence was enhanced by twenty levels under the United States Sentencing Guidelines on the basis of facts (other than a prior conviction) found by a judge under a preponderance-of-the-evidence standard, not by a jury under a reasonable-doubt standard.

This case is scheduled for the Court's consideration at its conference on September 28, 2004.

DISCUSSION

I. The District Court's Decision in *United States v. Green* Makes Clear That the First Circuit Failed to Recognize the Compelling Circumstances That Warranted a Departure Based on the Disparity Between Thurston's Sentence and a More Culpable Co-Defendant's Sentence.

In a wide-ranging decision, Chief Judge Young concluded in *United States v. Green*, ___ F. Supp. 2d ___, 2004 WL 1381101 (D. Mass. June 18, 2004), that the federal Guidelines violate the rule of *Apprendi*. Most relevant to Thurston's original filed certiorari petition is that Judge Young, in reaching his conclusion, provided a lengthy

description and analysis of real-world sentencing and plea bargaining under the federal Guidelines. The court's discussion included "straight talk" on the conduct of prosecutors in the District of Massachusetts, where Thurston was tried and sentenced, *e.g.*, *id.* at *2-16, and specific commentary on Thurston's case, *id.* at *4 n.26, *9. *Green* reinforces the merits of Thurston's arguments in support of granting certiorari on the question whether in compelling circumstances a district court has discretion to depart based on a disparity between the sentences of similarly situated co-defendants.[1] In short, the court cited Thurston as a "telling example" of a defendant who effectively was punished for exercising his right to trial—contrasted with pleading co-defendant Joseph Isola's probation-only sentence. *Id.* at *4 & n.26. The district court concluded that "prohibited fact bargaining" helped drive the "cruelly disparate sentences" between Thurston and Isola. *Id.* at *9. It is precisely in these prejudicial circumstances—which "the Court of Appeals [] failed to detect," *id.* at *9—that district courts should have discretion to depart. *See* Petition at 21-30.

The court explained that "[t]o achieve its ends, the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury." *Green*, 2004 WL 1381101, at *2. "[A] massive power shift from the judiciary to the executive" was expected under the Guidelines system, but "it was believed that a robust and independent judiciary could hold any excesses in check." *Id.* at *3. This latter expectation has not been borne out: prosecutors have been able "to manipulate sentences

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[1] Question three of the petition reads: "Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial." Petition For a Writ of Certiorari at i [hereinafter Petition].

and sentencing policy" and "the efforts of individual judges to control the whirlwind have been but a weak reed." *Id.* "As a result, the Sixth Amendment guarantee of trial by jury has been eroded as never before in the history of our nation. . . ." *Id.*

The court in *Green* explained that one of the mechanisms used to manipulate the Guidelines is "fact bargaining," in which prosecutors take advantage of their practical ability to withhold "relevant conduct" information from the sentencing judge to induce the defendant to plead. *Id.* at *4 & n.25 (citing *Berthoff v. United States*, 140 F. Supp. 2d 50, 62 n.19 (D. Mass. 2001) (Young, C.J.) (defining "fact bargaining" as "the knowing abandonment by the government of a material fact developed by law enforcement authorities or from a witness expected to testify in order to induce a guilty plea"), *aff'd*, 308 F.3d 124 (1st Cir. 2002)). "[T]he very formalism of the process has enhanced [prosecutors'] ability to control the information flow to the judge." *Green*, 2004 WL 1381101, at *4.

> While there may still be judicial limits on the outer boundaries of a prosecutor's assertion of relevant conduct . . . none prevents a prosecutor from turning a blind eye on conduct otherwise relevant. . . . So it is that the phenomenon known as "fact bargaining" has come to flourish as never before in the federal courts. [¶] The Department [of Justice] today has the power—and the incentive—to ratchet punishment up or down solely at its discretion. It does so most often to burden a defendant's constitutional right to a jury trial and thus force a plea bargain. The result: In the District of Massachusetts, an individual who stands up to the Department and insists on a jury trial gets, upon conviction, a sentence 500 percent longer than a similarly situated defendant who pleads guilty and cooperates.

Id. (footnotes omitted).

Judge Young pointed to the sentences of Thurston and his co-defendant Isola as a "telling example" of the sentencing disparity and prejudice to jury-trial rights caused by this prosecutorial manipulation. *Id.* at *4 n.26.[2] He concluded that "charge bargaining coupled with prohibited fact bargaining drove the cruelly disparate sentences in *United States v. Thurston*, but the Court of Appeals again failed to detect it, focusing instead on the perceived inadequacies in the district court's sentencing rationale." *Id.* at *9 (footnotes omitted). "Fact bargaining" "is flat-out illegal." *Id.* at *9 & n.69 (citing Guidelines provisions). But because "the practice constitutes a direct fraud on the Court, it is difficult to uncover." *Id.* at *9.[3] Nonetheless, Judge Young has been overtly critical of the First Circuit's willingness to accept the government's explanations, and failure to explore the issue in other cases. *See id.* at *9 & nn.70-71.

The *Green* decision makes clear that the First Circuit failed to recognize the compelling circumstances that warranted the sentencing judge's downward departure in this case. The prosecutors engaged in improper "fact bargaining" with Isola to secure a *nolo contendere* plea, then sought to punish Thurston more severely when he exercised his right to trial, by arguing for double-digit sentencing enhancements based on "relevant conduct" they withheld from the judge at Isola's sentencing. In such circumstances, as *Green* implies, there is a profound need for district courts to have departure power as a check

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[2] To the extent the opinion might be read to imply that Isola *cooperated* with the government, that reading is incorrect and unsupported by the record. *See* Petition at 2-3, 27.

[3] *See also id.* at *46 ("[F]act bargaining 'involves a fraud on the court as the government's recital of material facts during the plea colloquy and at sentencing necessarily must omit or at minimum gloss over facts material to sentencing.' Ultimately, massive sentencing disparities result from such conduct.") (quoting *Berthoff*, 140 F. Supp. 2d at 62) (footnotes omitted).

against prosecutorial manipulation of the Guidelines system, especially when that manipulation results in punishing a defendant for exercising the right guaranteed to him by the Sixth Amendment.

II. This Case Presents Sixth Amendment Issues Based on the Reasoning of This Court's Decision in *Blakely v. Washington*.

Eight days after Thurston filed his certiorari petition, the Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). In *Blakely*, the Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that a criminal sentence imposed under Washington state law violated the Sixth Amendment to the extent it was based on facts found by a judge rather than found by a jury or admitted by the defendant. The Court revisited the rule it had announced in *Apprendi*: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490). The Court held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

124 S. Ct. at 2537 (emphasis in original) (internal citations omitted).

Blakely represented "a sea change in the body of sentencing law." *United States v. Ameline*, 376 F.3d 967, 973 (9th Cir. 2004). One court has stated that "*Blakely* redefined 'statutory maximum.'" *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004), *cert. granted*, No. 04-104,

___ S. Ct. ___, 2004 WL 1713654 (Aug. 2, 2004); *see also Blakely*, 124 S. Ct. at 2546 (O'Connor, J., dissenting) (explaining that "[u]nder the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense" and "must now be charged in an indictment and submitted to a jury"). As Justice O'Connor correctly noted, "there is no map of the uncharted territory blazed by [the Court's] unprecedented holding" in *Blakely*. *Id.* at 2547 n.1 (O'Connor, J., dissenting).

On August 2, 2004, the Court granted certiorari in *United States v. Booker*[4] and *United States v. Fanfan*[5] to decide whether the Sixth Amendment is likewise violated by imposition of an enhanced sentence under the United States Sentencing Guidelines.

Thurston's case presents the same Sixth Amendment question as *Booker* and *Fanfan*. Thurston was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and sentenced in June 2002 under the federal Guidelines. The base offense level for this crime was six. Based on facts found by the judge under a preponderance-of-the-evidence standard, not by the jury under a reasonable-doubt standard, Thurston's sentence was increased by twenty levels:

> This is my ruling with respect to the offense level. A base offense level of 6, an aggravated role in the offense which is 4, more than minimal planning which is 2, and an intended loss of 14, which adds up to an offense level of 26. That makes the range between 63 months and 78 months.

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[4] 375 F.3d 508.

[5] *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (partial tr. of sentencing hr'g), *cert. granted before judgment*, No. 04-105, ___ S. Ct. ___, 2004 WL 1713655 (Aug. 2, 2004).

Pet. App. 203a-204a.[6] Based solely on the jury's general verdict of conspiracy to defraud, the applicable guidelines range would be zero to six months' imprisonment. *See* U.S.S.G., Sentencing Table. Once the district court imposed the enhancements, however, Thurston's sentence increased to a range of sixty-three to seventy-eight months' imprisonment, *see id.*, capped by 18 U.S.C. § 371 at sixty months. U.S.S.G. § 5G1.1(a); 18 U.S.C. § 371; 28 U.S.C. § 994(b)(1). The sentencing judge departed downward on two grounds from offense level twenty-six to level ten, Pet. App. 212a-213a, 233a-234a, but the First Circuit reversed the departure on both grounds, remanding for imposition of the statutory maximum sentence of five years' imprisonment. *Id.* 63a-64a.

This case would also present a different but related Sixth Amendment question even if the Court were to reject the Sixth Amendment challenges raised in *Booker* and *Fanfan*. Thurston's case squarely presents the fact pattern in which to test the two Sixth Amendment problems with federal sentencing identified by the Brief of *Amici Curiae* An Ad Hoc Group of Former Federal Judges In Support of Neither Party, filed September 1, 2004 in *Booker* and *Fanfan*. Not only was Thurston's sentence enhanced in the first instance, but the sentencing judge's downward departure, which offset sixteen of the twenty levels of enhancements, was reversed by the court of appeals under

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[6] The base offense level and enhancements correlate to the following provisions of the Guidelines: United States Sentencing Commission, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (providing base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (providing base offense level for fraud is six); *id.* § 2F1.1(b)(1) (providing for fourteen-level increase for "loss" greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (providing for two-level increase "[i]f the offense involved [] more than minimal planning"); *id.* § 3B1.1(a) (providing for four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive"). The November 1992 Guidelines were used to avoid retroactivity problems.

a nondeferential *de novo* review standard that the court interpreted the PROTECT Act[7] to require. The First Circuit, in conflict with other circuit courts of appeals' post-*Koon*[8] decisions, declared one ground on which the sentencing judge's departure was based—the disparity between Thurston's sixty-month sentence and a more culpable, non-cooperating co-conspirator's probation-only sentence—to be unavailable as a matter of law. *See* Petition at 6, 21-30. Additionally, the First Circuit reversed on the second departure ground—Thurston's strong record of charitable works and community service, which the sentencing judge found the most extraordinary he had seen in fourteen years of sentencing—after holding the PROTECT Act's *de novo* review provisions applicable, and determining *de novo*, with no deference to the sentencing judge's experience and expertise, that Thurston did not qualify for such a departure. *See id.* at 6-7, 18-21.

In short, through the operation of the PROTECT Act's new departure-restricting provisions, as well as the First Circuit's failure to afford the breadth of departure discretion required by *Koon*, Thurston was subjected to a scheme more akin to determinate sentencing. The question therefore arises whether the Sixth Amendment is offended by a system that requires a judge to find facts and impose sentence enhancements, yet simultaneously eviscerates that judge's discretion to depart to reach a just, individualized sentence. *Booker* and *Fanfan* involve sentence enhancements under the Guidelines but not in conjunction with departure decisions.

The certiorari petition as originally filed did not include these Sixth Amendment questions because, before *Blakely*, this Court had rejected constitutional challenges to the Guidelines, and the circuit courts uniformly had

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[7] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

[8] *Koon v. United States*, 518 U.S. 81 (1996).

rejected *Apprendi*-based challenges to the Guidelines. But now, *Blakely*'s reasoning gives rise to a straightforward argument that Thurston's sentence violated his right to trial by jury. Accordingly, in a concurrent filing, Thurston moves for leave to amend his certiorari petition by the Amendment bound therewith, in which the following two questions are added to those presented in the original filed petition:

> 4. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 5. If the answer to the question above is not an unequivocal "yes," the following question is presented: Whether imposition of such an enhanced sentence violates the Sixth Amendment when the sentencing judge's fact-intensive decision to depart from the applicable guideline range is subject to nondeferential *de novo* review, or when the sentencing judge is prohibited by law from departing based on a disparity between the sentences of similarly situated co-defendants.

See Motion to Amend Petition For a Writ of Certiorari, and Amendment bound therewith.

Thurston petitions for a writ of certiorari on these Sixth Amendment questions. *See id.* In the alternative, he asks that the petition be held and decided once the Court decides *Booker* and *Fanfan*, at which time summary disposition may be appropriate. *See id.* The questions presented in the original filed certiorari petition—pertaining to the retroactivity and interpretation of the PROTECT Act, the scope of *de novo* review of departures, and the availability of disparity-based departures—continue to be worthy of review by this Court, independent of the Amendment to the certiorari petition.

For these reasons, as well as the reasons set forth in the original filed certiorari petition, the motion to amend the certiorari petition, and the Amendment bound therewith, the Court should grant the petition, including the Amendment. In the alternative, this Court should defer ruling on the certiorari petition until the Court decides *Booker* and *Fanfan*. Then if the Court were to find that, in light of those decisions, this case presents questions worthy of review, the Court could grant certiorari on all or a subset of the questions. If the Court were instead to find none of the questions worthy of briefing and argument, it could nonetheless summarily reverse, or, if appropriate, it could grant, vacate, and remand for reconsideration in the lower courts in light of *Booker* and *Fanfan*. *See* 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); Sup. Ct. R. 16.1 (providing for "summary disposition on the merits").

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held and decided in light of this Court's decisions in the *Booker* and *Fanfan* cases, Nos. 04-104 and 04-105.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
Counsel of Record
LORI R.E. PLOEGER
MATTHEW D. BROWN
COOLEY GODWARD LLP
One Maritime Plaza, 20th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

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IN THE

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WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* FEDERAL DEFENDER OFFICE FOR THE DISTRICT OF MASSACHUSETTS, CRIMINAL JUSTICE ACT BOARD AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

JUDITH H. MIZNER
FEDERAL DEFENDER OFFICE FOR THE
DISTRICT OF MASSACHUSETTS
408 Atlantic Avenue
Boston, MA 02110
(617) 223-8061

For Federal Defender Office for the District of Massachusetts

CHARLES W. RANKIN
RANKIN & SULTAN
One Commercial Wharf, North
Boston, MA 02110
(617) 720-0011

For Criminal Justice Act Board

— Additional Counsel listed on the inside cover —

Dated: July 19, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

CAROL BROOK
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS
P.O. Box 22223
Nashville, TN 37202

For National Association of Federal Defenders

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

The Federal Defender Office for the District of Massachusetts provides legal representation for indigent defendants charged with federal crimes in the District of Massachusetts. The defense services are rendered by court appointment under the Criminal Justice Act, 18 U.S.C. § 3006A.

The Criminal Justice Act ("CJA") Board consists of ten attorneys appointed by the United States District Court for the District of Massachusetts to advise the District Court on issues relating to implementation of the Criminal Justice Act Plan of 1993. The CJA Board presents educational programs on federal criminal defense practice in order to guarantee that indigent defendants are well-represented. The CJA Board solicits and reviews applications from attorneys who wish to receive appointments under the Criminal Justice Act.

The National Association of Federal Defenders ("NAFD"), is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment to the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

From time-to-time, the Federal Defender Office, the CJA Board and the NAFD express their views on issues of concern to the indigent defense bar, the defense bar as a whole, and indigent defendants.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Pursuant to Rule 37.6 counsel for the *amici* state that no counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici*, contributed monetarily to the preparation or submission of this brief.

Review of sentencing decisions under the United States Sentencing Guidelines is a question of exceptional importance to the federal sentencing process. As attorneys representing individuals charged with federal offenses, *amici* have a substantial interest in how the changes in the standard of review of district court sentencing decisions wrought by § 401(d) of the PROTECT Act (Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, Pub.L.108-21) (codified at 18 U.S.C. § 3742(e)) will be interpreted and applied. The Federal Defender Office in Massachusetts and the CJA Board participated in the proceedings in the court below, filing an *amicus curiae* memorandum in support of petitioner William Thurston's petition for panel rehearing and rehearing *en banc* addressing, *inter alia*, the question of the meaning of the *de novo* standard of review required by § 401(d).

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* respectfully submit this brief in support of the petition for a writ of certiorari filed by William Thurston, in Case Number 03-1670.

INTRODUCTION AND SUMMARY OF ARGUMENT

This petition raises important questions concerning the nature and scope of appellate review under section 401(d) of the PROTECT Act (codified at 18 U.S.C. § 3742(e)). That provision changed, *inter alia*, the standard of appellate review of a district court's decision to depart from the otherwise applicable sentencing guideline range from abuse of discretion to *de novo*. The court below held that the *de novo* review imposed by the PROTECT Act precludes any deference to district court findings or conclusions save "findings of historical fact" (*United States* v. *Thurston*, 358 F.3d 51, 77 (1st Cir. 2004). The court of appeals also afforded no weight to the district court's finding that defendant's good works were

the most extraordinary it had seen in over fourteen years of sentencing criminal defendants (*id.*, at 79). *Amici* suggest that such determinations have an impact on every appeal in a criminal case raising issues of departures from the guidelines, that they were wrongly decided and that they should be reviewed by this Court.

De novo appellate review of departures under the United States Sentencing Guidelines does not preclude any and all deference to the district court's application of the guidelines to the facts of the case. Rather, recognition of the "special competence" and "institutional advantages" of the district court in the sentencing arena, described by this Court in cases such as *Koon* v. *United States*, 518 U.S. 81 (1996) and *Buford* v. *United States*, 532 U.S. 59 (2001), mandates that the *de novo* review standard be construed in this context as affording some deference to the district court's application of the guidelines to the facts. Departure decisions are not only fact-intensive, but require comparisons based on a body of knowledge and experience within the particular expertise of the district court.

Construing *de novo* review as requiring the appellate court to ignore the expertise of the district court would also violate the separation of powers doctrine.

ARGUMENT

I. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE NATURE AND SCOPE OF APPELLATE REVIEW OF DEPARTURE DECISIONS UNDER THE UNITED STATES SENTENCING GUIDELINES.

A. *De Novo* Review of a District Court's Departure Decision Requires Some Degree of Deference to a Sentencing Court's Expertise.

The PROTECT Act (Pub.L. 108-21) amended 18 U.S.C. § 3742(e)(3) and the paragraph of that subsection addressing the standard of appellate review. While continuing to direct the court of appeals to give "due regard" to district court credibility judgments and to accept the district court's findings of fact unless clearly erroneous, the amendment changed the standard of review for evaluating the propriety of the bases for a departure. The section now instructs the court of appeals to "review de novo the district court's application of the guidelines to the facts" in assessing the district court's determination that a departure is based on an appropriate factor or that it is justified by the facts of the case. Prior to the amendment, the court of appeals was to give "due deference to the district court's application of the guidelines to the facts" — a standard held by this Court to be abuse of discretion. *See, Koon* v. *United States*, 518 U.S. 81 (1996).

The court of appeals held that the *de novo* review required by the PROTECT Act amendment to 18 U.S.C. § 3742(e) precluded any deference to a district court's finding or conclusion other than to a finding of historical fact (*United States* v. *Thurston*, *supra*, 358 F.3d at 77). Accordingly, the court of appeals gave no deference to the district court's conclusion, based on the court's more than fourteen years of sentencing defendants, that a

downward departure for defendant's exceptional good works was warranted based on "a record of charitable work and community service [,which is] unique, extensive and extraordinary". Indeed, the district court concluded that in his "over fourteen years of sentencing defendants, . . . no one had a more extraordinary devotion to charitable work, community service and especially . . . to his church" (*id.*, at 79). Instead of focusing on the nature of defendant's conduct and evaluating it in the context of the conduct of other defendants, the court of appeals focused on the purpose of the sentencing guidelines to equalize the punishment for "blue collar" and "white collar" crime and defendant's status as a "white collar" criminal to conclude that defendant's good works were not exceptional.

Amici submit that this interpretation and application of the scope of *de novo* review is impermissibly restrictive, ignoring the expertise and special competence of the district court and prior decisions of this Court.

This Court has made clear that a *de novo* standard of review does not flatly preclude any and all circuit court deference to a district court's application of law to the facts of the case. *Ornelas* v. *United States*, 517 U.S. 690 (1996) held that ultimate questions of reasonable suspicion and probable cause for warrantless searches should be reviewed *de novo*. Yet, in explaining how this *de novo* review is to be effected, this Court stated:

> We therefore hold that as a general matter determinations of probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by

> resident judges and local law enforcement officers.
>
> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. . . . The background facts, though rarely the subject of explicit findings, inform the judge's assessment of historical facts.

Id., 517 U.S. at 699-700. Thus, *Ornelas* makes clear that even under *de novo* review, an appellate court must give some deference to conclusions based upon the background experience and expertise of the district court (as well as, in search situations, to the police officer) whose conclusions are under review.

In *United States* v. *Raddatz*, 447 U.S. 667 (1980) this Court analyzed a provision of the Federal Magistrates Act addressing referral of a suppression motion to a magistrate. While the district court was required to make a *de novo* determination of a magistrate's report, findings and recommendations where objections are made, this Court concluded that in making that *de novo* determination the district court could place whatever reliance it "in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." (*id.*, at 676.)

Review of departures under the United States Sentencing Guidelines is, like determinations of probable cause, an area where some deference to the findings and conclusions of the district court is essential. Departure jurisprudence is, as the applicable guidelines provisions show, inherently fact intensive. U.S.S.G. § 5K2.0(a)(1) authorizes departures from the applicable guideline

range, generally, where there exists an aggravating or mitigating circumstance

> of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

Section 5K2.0(a)(3) provides that a departure

> may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

And § 5K2.0(a)(4) provides that a circumstance in the offender characteristics section of the guidelines or elsewhere identified "as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.". The Background following the application notes recognizes the "integral function" of departures in the sentencing guideline system. As stated in U.S.S.G. § 1A1.1, Editorial Note, Part A 4 (b), discussing departures:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland", a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct

> significantly differs from the norm, the court may consider whether a departure is warranted.

These departure provisions require a comparative and evaluative analysis. To determine whether a circumstance is "exceptional", "atypical" or "significantly differs from the norm" the district court must not only make findings concerning the conduct of the defendant being sentenced, but place that conduct in the context of the conduct of other defendants and, perhaps, the broader population to determine whether, evaluating such information and circumstances, a departure is warranted.

Therefore, whether a particular situation is sufficiently "exceptional" to warrant a departure is not a decision made solely on the basis of abstract legal principles and standards; the facts of the particular case and the district court's background knowledge and experience are pivotal to the decision. *See, e.g., Koon* v. *United States*, 518 U.S. 81, 99-100 (1996) ("The relevant question, however, is not . . . 'whether a particular factor is within the "heartland"' as a general proposition, . . . , but whether the particular factor is within the heartland given all the facts of the case.") The amendment to 18 U.S.C. § 3742(e) requiring the court of appeals to determine whether a sentence outside the applicable guideline range is "justified by the facts of the case" plainly requires a fact-bound determination.

This Court has recognized the "institutional advantages" and "special competence" of the district court in making determinations under the sentencing guidelines. *See, e.g., Koon* v. *United States, supra*, 518 U.S. at 98-99 (departures "embod[y] the traditional exercise of discretion by a sentencing court" and call for a district court to make "a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing"); *Buford* v. *United States, supra*, 532 U.S. at

64-65 (relationship of cases for purposes of career offender guideline is an area where district courts have special competence). On the front lines, district courts see many more sentencing guidelines cases than do courts of appeals. Because district court judges have experience in sentencing that appellate court judges ordinarily lack, they are in a far better position to know whether a departure factor truly applies to a defendant, whether circumstances are exceptional or significantly different from the norm. Of course, district court judges are not infallible — trial judges commonly say that sentencing is the most difficult part of a difficult job — but their front-line experience gives their judgment a context that appellate judges lack. In addition, district court judges are, on the whole, far better informed about sentencing than are circuit judges. They attend sentencing institutes, speak about sentencing at legal education programs for lawyers and probation officers, and, perhaps most important, share public-record information about their cases with their colleagues.

In contrast, the courts of appeals generally see only those cases in which a departure has been granted and the government has chosen to appeal, primarily a limited subset of cases deemed extraordinary by the district courts.[2] District courts, therefore, have a vastly broader range of experience for assessing the exceptional or outside the heartland circumstance, an experience

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[2] Again, as this Court stated in *Koon*, *supra*, 518 U.S. at 98-99:

> Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts on making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.

which, even under a *de novo* review standard, should be respected, not ignored.

Yet, the First Circuit's construction of the *de novo* standard of review set out in the PROTECT Act amendments to 18 U.S.C. § 3742(e) would completely reject that experience as irrelevant.

Not only does the district court have expertise which should be recognized, but decisions resolving fact-intensive determinations provide comparatively less future guidance than those resolving questions and principles of law. As this Court stated in *Buford* v. *United States*, *supra*, 532 U.S. at 65-66, in imposing an abuse of discretion standard for appellate review of a district court's determination as to whether prior convictions were related for purposes of the career offender guideline:

> Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances. And the fact-bound nature of the decision limits the value of appellate court precedent, which may provide only minimal help when other courts consider other procedural circumstances, other state systems, and other crimes.

See also, Cooter & Gell v. *Hartmax Corp.*, 496 U.S. 384, 404 (1990) noting that the more fact-intensive the question, the less the value of appellate court precedent.

Respect for the Congressional imposition of a *de novo* standard of review does not require the draconian interpretation utilized by the court below. Standards of review are not a matter of black and white, bright-line distinctions. Rather, they fall along a spectrum gradated by the nature of the issue in question. While the PROTECT Act's *de novo* standard certainly requires

increased scrutiny of some sentencing departures, this Court's precedent dictates that the sentencing judge's conclusions that a departure is justified is still entitled to considerable respect. Indeed, Congress, in using the term "de novo" in the PROTECT Act is deemed to have the *Ornelas* analysis in mind. As this Court has said, "we presume that Congress expects its statutes to be read in conformity with this Court's precedents[.]" *United States* v. *Wells*, 519 U.S. 482, 491, 495 (1997) (omitting citation).

In this case, the failure to afford any deference to the district court's findings was exacerbated by an overly restrictive view of what constitutes a finding of fact. 18 U.S.C. § 3742(e) instructs the court to "accept the findings of fact of the district court unless they are clearly erroneous." Nonetheless, the court of appeals limited that acceptance to what it called "historical facts" (*Thurston*, *supra*, 358 F.3d at 77). It distinguished its limited universe of fact from what it characterized as an ultimate conclusion — "whether a defendant's good works are 'exceptional.'" (*id.*). Accordingly, it gave no deference or weight to the district court's determination that defendant's good works were the most extraordinary the court had seen in over fourteen years of sentencing criminal defendants (*id.*, at 79). *Amici* suggest that for purposes of reviewing the justification for a departure based on a determination that defendant's conduct was "exceptional", the district court's determination was a finding of fact within the meaning of the statute. Moreover, it was the type of comparative evaluation at the heart of determining whether a departure is warranted, placing the defendant's conduct in the context of that of other defendants. It should not have been ignored in reviewing whether the departure was justified by the facts of the case under 18 U.S.C. § 3742(e)(3)(iii).

B. The Statutory Construction of the Court of Appeals Raises Separation of Powers Concerns.

To construe the Congressional imposition of *de novo* review as precluding any deference to the findings of the district court raises separation of powers concerns. Sentencing is primarily a judicial function, the resolution of a "case" or "controversy" entrusted to the judiciary under Article III of the United States Constitution. Removing from the judiciary the authority to determine how that central function will be performed constitutes unwarranted encroachment by the legislative branch. "The constitutional system of checks and balances is designed to guard against 'encroachment or aggrandizement' by Congress at the expense of the other branches of government." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (Bankruptcy Reform Act grant of jurisdiction to bankruptcy judges violated Article III of the Constitution). This Court has expressed its intent to ensure "that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch'" (*Mistretta* v. *United States*, 488 U.S. 361, 383 (1989)). In *Mistretta*, *supra* this Court rejected a separation of powers challenge to the United States Sentencing Guidelines in part because the Sentencing Commission is located in the judicial branch of the United States government, noting that had the executive been delegated authority to promulgate the guidelines the answer might have been different and quoting 1977 testimony of a Department of Justice official that "[i]f guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function." (*id.*, at 391, n.17).

Whether labeled procedural or substantive, a standard of review can determine the result of a case. *See, e.g.*, *Cooper Industries* v. *Leatherman Tool*, 532 U.S. 424, 441 (2001); *In re Rasbury* v. *IRS*, 24 F.3d 159, 167

(11th Cir. 1994). Interpreting the *de novo* standard of review as a Congressional command precluding any deference to the expertise, experience and special competence of the district court in sentencing encroaches on the judicial function by dictating a standard of review violative of that which this Court has deemed necessary to properly effectuate the judicial function in sentencing.

CONCLUSION

For the foregoing reasons *amici* respectfully request that this Court grant the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in *United States* v. *Thurston*, 358 F.3d 51 (1st Cir. 2004).

Respectfully submitted,

JUDITH H. MIZNER
FEDERAL DEFENDER OFFICE FOR THE
DISTRICT OF MASSACHUSETTS
408 Atlantic Avenue
Boston, MA 02110
(617) 223-8061

For Federal Defender Office for the District of Massachusetts

CHARLES W. RANKIN
RANKIN & SULTAN
One Commercial Wharf, North
Boston, MA 02110
(617) 720-0011

For Criminal Justice Act Board

CAROL BROOK
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS
P.O. Box 22223
Nashville, TN 37202

For National Association of Federal Defenders

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IN THE

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

July 19, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether applying the PROTECT Act to a case pending on appeal on the date of enactment contravenes statutory construction, retroactivity, and *ex post facto* doctrines.

2. Whether *de novo* review to determine whether a departure is "justified by the facts of the case" (a) is limited to consideration of extra-record sources that the district court is entitled to consider, and (b) requires affording weight to the district court's experience, expertise, and unique vantage point in sentencing.

3. Whether a district court has discretion to depart from the applicable guideline range based on a disparity between the sentences of similarly situated co-defendants, when otherwise a defendant would be prejudiced by prosecutorial manipulation of the guidelines, or punished for exercising the constitutional right to trial.

Amici will address only the third question in their brief.

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28 C.F.R. 2.20, Chapter Eleven,
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Miscellaneous:

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Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 8

Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale. L.J. 1681 (1992) 14

Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) . . 17

Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 Fed. Set. R. 116 (1993) 12

James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345 (1998) . . . 14, 15

Tony Mauro, "*Lawyers Seeing Red Over Lobster Case*," LEGAL TIMES (Feb. 16, 2004). 1

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF")[1] is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing *amicus curiae* briefs in this and other federal courts, promoting a limited and accountable government and opposing abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice.

Since the U.S. Sentencing Commission's establishment over 17 years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding various substantive issues. WLF has been particularly critical of the Guidelines and their application where they produce excessive prison sentences, particularly with respect to minor environmental regulatory infractions, which are better remedied by administrative and civil enforcement rather than by the heavy hand of criminal prosecution.[2]

WLF has also urged the Commission and its advisory committees to operate in a transparent manner when formulating Commission policy and guidelines and

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

[2] *See, e.g., McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 129 S.Ct. 1406 (2004) (97-month sentences imposed for importing lobster tails in plastic bags instead of cardboard boxes). *See also* Tony Mauro, *"Lawyers Seeing Red Over Lobster Case,"* LEGAL TIMES (Feb. 16, 2004).

has taken the Commission to task and to court for failing to do so. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1993); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996).

WLF has also opposed the growing and disturbing trend by the Justice Department to prosecute corporate employees and officers under the so-called "responsible corporate officer" doctrine that impermissibly allows the *mens rea* requirement to be diluted or ignored altogether. *See, e.g., Hansen v. United States*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002) (father and son sentenced to prison under the Guidelines for nine *years* and four *years* respectively for minor environmental infraction).

The Allied Educational Foundation (AEF) is a non-profit public policy organization based in Englewood, New Jersey. Founded in 1964, AEF promotes diverse areas of study in public policy issues and has appeared as amicus curiae along with WLF in numerous cases.

Amici believe that the court of appeals decision in this case prohibiting the trial court from departing from the Guidelines in order to correct unwarranted sentencing disparities between co-defendants was wrongly decided, conflicts with the decisions of other circuits, and undermines the integrity of the criminal justice system and the public's respect of the judiciary.

Accordingly, this Court should grant review and reverse the judgment below.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt the Statement of the Case as presented by the Petitioner. Pet. 2-7. In brief, Thurston and three co-defendants, who were former executives of Damon Clinical Laboratories, were indicted on one count of conspiracy for defrauding the government. 18 U.S.C. § 371. The government alleged that the laboratory had charged the Medicare program for certain blood tests which, while performed by the laboratory, were deemed to be medically unnecessary in most cases.

The government offered a plea deal to Joseph Isola that essentially allowed him to plead nolo contendere and to receive a probationary sentence. He did not agree to cooperate with the government in its further investigation and prosecution of the case. The district court sentenced Isola to three years probation and imposed a $100 assessment.

The government offered a similar plea deal for Thurston. However, believing he was innocent, he rejected the deal and exercised his constitutional right to stand trial. A jury found him guilty of one count of conspiracy as charged. Although the prosecutors argued for a guideline sentence of 78 to 97 months (capped by the statutory maximum of five years for conspiracy) based on the "intended loss" to the Medicare program, the district court departed downward for two reasons: Thurston's extensive charitable works and the gross disparity between the probation imposed on Isola, whom the court considered more culpable, and the five year sentence sought by the prosecutors for Thurston. The trial court then imposed a three-month prison term and 24 months' supervised release

to achieve uniformity and proportionality in sentencing.

The government appealed the sentence, and in the interim, Congress enacted -- after Thurston completed his term of imprisonment and home detention -- the so-called PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, otherwise known as the Feeney Amendment. The PROTECT Act significantly altered the sentencing and review process, including, *inter alia*, providing courts of appeals with *de novo* review authority when reviewing departure decisions by trial courts instead of the due deference standard.

Using this newly minted authority, the court of appeals rejected the district court's departure decision and remanded the case to the district court with instructions to impose the statutory maximum of five years imprisonment. The trial judge, finding that the appellate review process made him "superfluous," recused himself from the case rather than be complicit with carrying out such a miscarriage of justice. Pet. 5.

REASONS FOR GRANTING THE PETITION

WHETHER A DISTRICT COURT HAS DISCRETION TO DEPART FROM THE GUIDELINES BECAUSE OF GROSS DISPARITIES BETWEEN THE SENTENCES OF SIMILARLY SITUATED CO-DEFENDANTS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

This case epitomizes much of what is fundamentally wrong with the misnamed Sentencing Guidelines. Rather than "guiding" the discretion of the sentencing authority, the Guidelines effectively dictate that draconian sentences be

imposed, regardless of the inherent unreasonableness of the sentence either standing alone or when compared with disparate sentences imposed on similarly situation co-defendants.

The stark facts in this case present the Court with a perfect opportunity to clarify this important area of the law and to let district courts know that they need not be unthinking automatons when they carry out what is perhaps the most important judicial duty that society has entrusted them with: dispensing justice that entails depriving citizens of their liberty.

A. Courts Should Be Able to Depart from Guideline Sentences That Are Irrational

In this case, Thurston was indicted, elected to stand trial, and was found guilty of one count of conspiracy under 18 U.S.C. § 371. Congress provided that the maximum sentence for that crime should be no longer than five years in prison. Yet the Guidelines dictated that the prison sentence for Thurston -- who had no prior record, and thus, had the lowest possible category offender score -- should be 78 to 97 months in prison. Pet. 3.

Applying the "wisdom" embodied in the Guidelines from the Sentencing Commission, the guideline sentence for Thurston was approximately 30 to 60 percent *longer* than what Congress intended should be meted out to the *worst* offender for the *worst* possible case of conspiracy. Of course, no court could impose a guideline sentence that exceeds the statutory maximum; accordingly, the sentence in this case had to be capped at five years or 60 months, the statutory maximum, which the court of appeals dutifully, but wrongfully, ordered the district court to impose in this

case. In short, the statutory *maximum* sentence that *could* be imposed, became the mandatory *minimum* sentence that *had* to be imposed under court of appeals' inflexible application of the deeply flawed Guidelines. Mandatory minimums are now statutory maximums.[3]

The fact that a first offender's sentence computed under the Guidelines greatly exceeds the statutory maximum -- a disturbing phenomenon that is all too often repeated in other cases -- is proof enough of the irrationality of the guideline scheme. But, the irrationality of the Guidelines is further magnified in this and other guideline cases when one takes into account that the sentences imposed under the Guidelines are determinate ones; parole has been abolished by the Sentencing Reform Act.

Prior to the promulgation of the Sentencing Guidelines in 1987, the normal practice was that defendants sentenced to prison for more than one year were generally eligible for parole after serving only one-third of the sentence imposed. 18 U.S.C. § 4205(a)(1976)(repealed 1984). Thus, under the pre-guideline system, if an offender were sentenced to prison for the statutory maximum of five years for conspiracy, a rare event indeed, that defendant could be eligible for parole. Likely candidates for parole included first-time offenders for non-violent regulatory

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[3] Indeed, before the establishment of the Guidelines, sentencing courts in multiple count cases would often order the sentences to be served *concurrently* for related counts. Now, it is not unusual for courts to make all or a portion of the related second count to run *consecutively* in order to "stack" the sentences to meet the arbitrary and excessive sentence dictated by the Guidelines in a particular case.

offenses.[4]

Thus, just like when comparing the prices of goods today with the prices paid 20 years ago, one must adjust for inflation to determine the "real" dollar cost. So too, in the post-Guideline sentencing scheme, a determinate sentence today of 60 months or five years may actually represent, in real incarceration terms, a staggering pre-guideline prison sentence of up to three times that amount, namely 180 months, or *15 years*.

Congress mandated in 18 U.S.C. § 3553(a) that the sentencing court "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of

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[4] Indeed, for those convicted of certain environmental violations and sentenced to prison in the pre-Guideline era, they would have been eligible for parole after serving only 0 to 10 months of their sentence. *See* 28 C.F.R. 2.20, Chapter Eleven, Subchap. H -- Environmental Offenses, 1172(d). Yet the Guidelines are particularly harsh on those who commit environmental infractions. *See, e.g.*, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 129 S.Ct. 1406 (2004). In *McNab*, licensed seafood dealers were sentenced to draconian 97-month prison terms under the Lacey Act for importing frozen lobster tails from Honduras because the shipments, which were routinely cleared by Customs and the Food and Drug Administration officials, were transported in clear plastic bags rather than in cardboard boxes, allegedly in violation of an obscure Honduran packing regulation, even though the Republic of Honduras asserted the regulation was invalid. Because of the gross value of the shipments (rather than the meager profits for the importers), the Guidelines called for an arbitrary sentencing range of 97-121 months; the best the court thought it could do under the circumstances was to impose a sentence at the lower end of the range. For an excellent critique of the Guidelines for environmental offenses, see B. Sharp & L. Shen, *The (Mis)Application of Sentencing Guidelines To Environmental Crimes*, BNA Toxics L. Rpt'r 189 (July 11, 1990).

punishment] set forth in paragraph (2) of this subsection," *e.g.*, "respect for the law," "just punishment," and "deterrence." § 3553(a)(2) (emphasis added). The fundamental principle of this congressional directive is conservation of punishment, an important hallmark of a democratic society that does not inflict arbitrary, unnecessary, or gratuitous punishment on its citizens.[5]

Section 3553(a) does not require that the sentence "comply" with the sentencing guidelines specified in §

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[5] *Amici* realize that the Sentencing Commission was not locked into pre-guideline practice where probation had been often imposed for certain white-collar crimes. But according to one of the original Sentencing Commissioners:

> [T]he Commission deliberately chose, except in the least serious cases of these white-collar crimes (level '6' or less), to require some *minimum form of confinement of one to six months*--either intermittent confinement, community confinement, or imprisonment. The Commission took this course for two reasons. First, the Commission considered present sentencing practices, where white-collar criminals receive probation more often than other offenders who committed crimes of comparable severity, to be unfair. Second, the Commission believed that *a short but definite period* of confinement might deter future crime more effectively than sentences with no confinement condition.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20-21 (1988) (footnotes omitted). Remarkably, the three-month prison sentence imposed by the district court on the Petitioner in this case falls squarely within the range contemplated by then-Commissioner Breyer; unfortunately, however, applying the Guidelines in this case resulted in a sentence *exceeding* the statutory maximum of five *years*.

3553(a)(4), but only directs the court to "consider" the Guidelines. Thus, under subsection (a), the Guidelines appear to be truly guidelines which the court should consider, not inflexible mandates to be blindly followed.

However, the very next subsection, 18 U.S.C. § 3553(b), states that the court "shall impose a sentence of the kind, and within the range" specified by the Guidelines. The "guidelines" of subsection (a) are effectively transformed into the inflexible rules of subsection (b). And, depending upon the particular sentence generated by the Guidelines, the sentence may run afoul of the conflicting mandate of subsection (a) and its conservation of punishment ("sufficient, but not greater than necessary") standard.

Such excessive sentences (such as the 97-month prison sentence imposed in *McNab* for the regulatory offense of importing frozen lobster tails in plastic bags instead of cardboard boxes, see note 2, *supra*) suggest that the particular guideline provisions may have been arbitrarily or capriciously drafted by the Commission, and that applying them would contravene the court's sentencing duties under § 3553(a). In such a situation, the arbitrary guideline can be, and should be, disregarded by the sentencing court, just as other arbitrary agency regulations have been found invalid.[6]

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[6] In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), for example, the court of appeals unanimously struck down the applicable guideline in that case, 18 U.S.C.S. Appx § 2J1.6, and remanded the case to the district court for resentencing as if the guideline did not exist because the guideline was "not sufficiently reasonable and violate[d] the statutory mandate given to the Sentencing Commission" by producing unreasonably lengthy sentences. *Id.* at 892. Comparing the Sentencing Commission to any other federal regulatory agency, the

Notably, § 3553(b) expressly allows the court to depart from the guideline sentence if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." *Id.* In the instant case, the district court justified its departure in part because the gross disparity between the sentences for the two co-defendants (probation versus five years) ran counter to Congress' direction that sentencing courts are also to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." § 3553(a)(6).

However, the court of appeals rejected the district court's downward departure on the basis of gross disparities in sentencing, stating that such departures were precluded by circuit precedent in *United States v. Wogan*, 938 F.2d 11446 (1st Cir. 1991). Pet. App. 54a-55a. According to the court of appeals, "guidelines bind us and they bind the district court. The downward departure based on disparity in sentences among co-defendants was impermissible." Pet. App. 55a. In short, the First Circuit's rule is that when faced with competing sentencing mandates by Congress, the courts are to blindly follow the mechanistic rule of applying the oxymoronic Guidelines under § 3553(b), even though to do so would violate the court's mandate under § 3553(a) and frustrate one of Congress' primary purpose for having

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standard of review of its regulations (guidelines) is whether they are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981)).

guidelines: to eliminate disparities in sentences.

Amici submit that not only was *Wogan* wrongly decided, but the decision also conflicts with decisions of other circuits which recognize the authority of sentencing courts to depart from the Guidelines because of sentencing disparities, including disparities generated due to abuse of prosecutorial discretion.[7] Review is particularly warranted in this area of federal law because uniform application of sentencing by courts across the country is the raison d'etre' of the Guidelines, whereas with respect to other substantive areas of federal law, differing interpretations by the circuits of the federal statute in question may be more tolerable.

B. Courts Should Be Able to Depart from Guideline Sentences That Produce Gross Disparities in Sentences, Particularly Between Co-Defendants

While the draconian sentences regularly imposed under the diktats of the Guidelines are bad enough, the gross disparity of the sentences between Petitioner (five years imprisonment) and his more culpable co-defendant Joseph Isola (probation) make it abundantly clear that departures in such cases are not only warranted, but as previously noted, also further Congressional intent and the primary purpose of the Guidelines, namely, to *reduce* disparity in sentencing.

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[7] *See* Pet. 22-26 (citing, *inter alia*, *United States v. Wright*, 211 F.3d 233 (5th Cir. 2000); *United States v. Caperna*, 251 F.3d 827 (9th Cir. 2001); *United States v. Walls*, 293 F.3d 959 (6th Cir. 2002); *United States v. McMutuary*, 217 F.3d 477 (7th Cir. 2000)).

As one commentator aptly noted:

> Of all the problems that inspired Congress to establish guidelines, none was as urgent as inconsistency in sentencing. 18 U.S.C. 3553(a) lists "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" as one of the primary sentencing considerations. The guidelines reflect this commitment in the opening policy statement. The goal of uniformity is no less pressing simply because two defendants happen to be joined in the same case. In fact, similarly situated defendants accused of the same crime so clearly deserve similar punishments that they present test cases for the legitimacy of the guidelines.

Eric Lotke, *Sentencing Disparity Among Co-Defendants: The Equalization Debate*, 6 Fed. Set. R. 116 (1993) *available at* 1993 WL 561438 (footnote omitted). As the Sentencing Commission itself reminds us:

> *The guidelines seek fairness*, which is the establishment of sanctions proportionate to the severity of the crime and *the avoidance of unwarranted disparity, by setting similar penalties for similarly situated offenders*.
>
> * * * *
>
> Disparity in sentencing has long been a concern for Congress, the criminal justice community, and the public.

U.S. Sentencing Comm'n, 2002 ANNUAL REPORT 1 (emphasis added).

The First Circuit's rationale for rejecting departures based on disparities is its mistaken view expressed in *United States v Wogan*, *supra*, that because the Guidelines were intended to eliminate "*nationwide* disparities," intra-case disparities can and must be tolerated. 938 F.2d at 1449. This view leads to the nonsensical conclusion that if intra-case disparities are widespread enough, they should be tolerated because at least the sentences are *uniformly* bad.

C. Sentencing Disparities Which Are Aggravated by Prosecutorial Misconduct Especially Warrant Downward Departures

As this case graphically illustrates, the gross disparities between the sentence imposed on Petitioner and his co-defendant came about as a result of the common practice of charge bargaining and fact bargaining that the district court found particularly odious. As described further herein, under charge bargaining, prosecutors will offer to drop charges if the defendant pleads guilty; under fact bargaining, prosecutors agree to refrain from presenting aggravating facts to the court in return for guilty pleas, thus ensuring lighter sentences. Both practices have been sharply criticized.

As noted, Isola pled nolo contendere to one count of conspiracy and received probation, a sentence which was not opposed by the government. Thurston exercised his constitutional right to go to trial and was found guilty. The short prison sentence imposed on Thurston was greater than the purely probationary sentence for Isola that was agreeable to the government, even though the court stated that Isola was more culpable. Yet, government prosecutors urged the court to impose a guideline sentence of 78 to 97 months (capped by the statutory maximum of 60 months).

Unfortunately, the abusive prosecutorial practices that produced the disparities in this case are all too common in our system of justice. As one commentator noted:

> The problem of unjustified disparity is not illusory. Commentators have identified numerous sources of disparity in Guidelines sentencing, such as inconsistent charging practices, conflicting judicial interpretations of key provisions, prosecutorial and judicial circumvention of the Guidelines, an undue emphasis on drug and monetary quantities, and pre-arrest sentence manipulation by police officers and government investigators. Moreover, judges appear to have grown frustrated by the Guidelines' inability to resolve these problems. Under these circumstances, there can be little doubt that the problem of unwarranted disparity continues to persist in a substantial number of cases. Thus, a blanket rule against departures to remedy this problem appears, on its face, to be inappropriate.

James A. McLaughlin, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2347 (1998) (footnotes omitted).[8] Indeed, downward departures would not only further Congress' intent of reducing disparities, but also would bring transparency into the sentencing process which will promote public confidence in the integrity of the judicial system.

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[8] See also Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale. L.J. 1681, 1723-24 (1992) (observing that differing prosecutorial practices are a source of hidden and unreviewable disparity).

> Permitting judges to depart on the basis of unjustified disparity among codefendants could have salutary consequences beyond improving the fairness of the sentences at hand. It could lead to a richer and more honest discussion of the underlying purposes of sentences and how they are--or are not--served by the current structure of the Guidelines. Ultimately, the causes of unjustified sentencing disparity are best addressed through revision of the Guidelines themselves. In the meantime, though, departures can reduce such disparity and draw attention to the areas of the Guidelines that judges find especially problematic.

Id. at 2350 (footnotes omitted).

While many noted jurists, including several on this Court, have vigorously and forthrightly denounced the inherent unfairness of the Sentencing Guidelines and their application in many cases, perhaps no judicial opinion has been more damning of the Guidelines and their manipulation by the government than the blistering attack recently launched by Chief Judge William G. Young in *United States v. Green*, 2004 U.S. Dist. LEXIS 11292 (D. Mass.) (June 18, 2004). In his 133-page scholarly and insightful tour de force, bolstered with 415 footnotes, Judge Young takes no prisoners when exposing the flaws of the sentencing process:

> The Department today has the power -- and the incentive -- to ratchet punishment up or down solely at its discretion. It does so most often to burden a defendant's constitutional right to a jury trial and thus force a plea bargain. The result: In the District of Massachusetts, an individual who stands up to the

> Department and insists on a jury trial gets, upon conviction, a sentence *500 percent longer* than a similarly situated defendant who pleads guilty and cooperates.

Id. at *18. (emphasis added) (footnotes omitted). Indeed, Judge Young cites the instant case as a prime example of the problem:

> [C]harge bargaining coupled with prohibited fact bargaining drove the cruelly disparate sentences in *United States v. Thurston*, but the Court of Appeals again failed to detect it, focusing instead on the perceived inadequacies in the district court's sentencing rationale.

Id. at *42. (footnotes omitted)

For example, with respect to charge bargaining, Judge Young states:

> The pressure is placed upon the defendant by bringing a multi-count indictment and then trading away charges or counts more difficult to prove in return for a guilty plea to other counts or lesser charges. * * * True, Attorney General Ashcroft has recently forbidden Departmental charge bargaining in no uncertain terms. . . .
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> * * * *
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> But this appears to be sound and fury, signifying little. Charge bargaining continues in this District as before and Department attorneys seem to know little about the centralized permitting process Attorney General Ashcroft has implemented.

Id. at *25-*26 (footnotes omitted).

Similarly, Justice Anthony Kennedy noted in his impassioned plea last August before the American Bar Association:

> Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. attorney, often not much older than the defendant, is misguided. . . . The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.[9]

With respect to fact bargaining, Judge Young was more searing in his attack on that practice than he was on charge bargaining:

> The most repugnant of the Department's tactics is to lie to the Court in order to induce a guilty plea. This

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[9] Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *portions reprinted in ABA Justice Kennedy Commission: Report to the House of Delegates* (June 2004), *available at* www.abanet.org/crimjust/kennedy/commutation.pdf. Accepting Justice Kennedy's challenge, the ABA established the Justice Kennedy Commission, chaired by noted criminal law professor Stephen A. Saltzburg, to review and make recommendations to the ABA House of Delegates regarding sentencing systems at the federal and state levels. The Commission issued its report on June 23, 2004, and its recommendations will be considered at ABA meeting Annual Meeting in Atlanta on August 9-10, 2004.

> is the process known as "fact bargaining." It occurs when a departmental attorney "swallows the drugs" or "the gun" as the case may be, i.e., fails to report to the probation officer in rendering its descriptions of offense conduct (and then later fails to bring to the attention of the Court) relevant evidence that may affect the guidelines calculation in order to reduce that calculation to secure a disposition to which it and defense counsel have agreed. This, of course, is flat-out illegal, and Attorney General Ashcroft has prohibited it in no uncertain terms. This Court is unaware of any instance where the Attorney General has disciplined a Department attorney for engaging in the practice.

Id. at *41.

Precisely because the Justice Department's abusive prosecutorial practices and manipulation of the Sentencing Guidelines unduly force over 97 percent of federal defendants to plead guilty rather than exercise their constitutional right to trial, and thereby forego appellate review of their sentences, this case presents the Court with a rare but perfect opportunity to provide much needed guidance to the judiciary on the proper application of the Guidelines by the trial court, appropriate disparity-based departure decisions, and the scope of appellate review of such departure decisions.

CONCLUSION

For the foregoing reasons and those presented by the Petitioner, the Court should grant the petition for writ of certiorari. At a minimum, the Court should direct the Acting Solicitor General to submit a response to the petition.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

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